TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1924

No. [redacted] 74

ISABELLA VALLEY RAILWAY COMPANY,
PETITIONER,

vs.

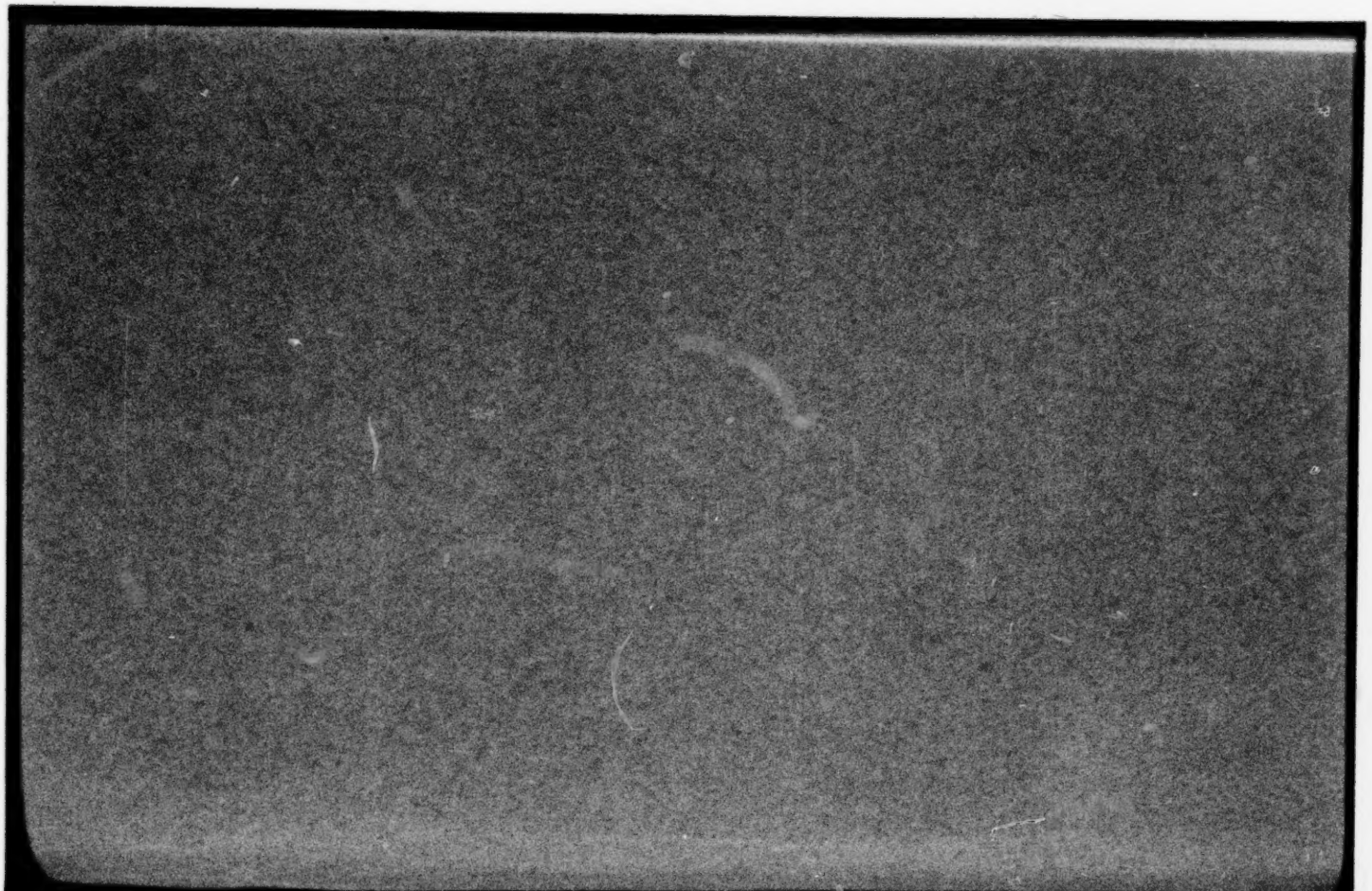
ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF [redacted] E. CALDINE, DECEASED

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED [redacted]

CERTIORARI GRANTED APRIL 6, 1925

(24,291)



(33,241)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 789

UNADILLA VALLEY RAILWAY COMPANY,
PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF HAROLD E. CALDINE, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN COURT OF APPEALS OF NEW YORK

CLERK'S CERTIFICATE

I, Wm. J. Armstrong, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of case on appeal in the case entitled "Ernest Caldine, as Administrator of the Goods, Chattels and Credits of Harold E. Caldine, deceased, Appellant, against Cinadilla Valley Railway Company, Respondent," with the case on appeal found in bound volume of cases and briefs No. 146, for the year 1927, on file in this office, and that the same is a correct copy of said case on appeal. That the said appeal came into the Court of Appeals on the fourth day of March, nineteen twenty-seven, and that it was on the eighteenth day of October, nineteen twenty-seven, argued in said court by David F. Lee for the appellant and William H. Sullivan for the respondent and that on the twenty-second day of November, nineteen twenty-seven, a decision therein was handed down by said court, which reads as follows: "Judgment of the Appellate Division reversed and that of the Trial Term affirmed, with costs in this court and in the Appellate Division." That, on the twenty-third day of November, nineteen twenty-seven, the remittitur of this court was issued to the Clerk of the Supreme Court, a duplicate copy of said decision and remittitur being attached to the aforementioned case on appeal.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this twentieth day of February A. D., 1928.

Wm. J. Armstrong, Clerk. (Seal Court of Appeals State of New York.)

[fol. c] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 22nd day of November,

in the year of our Lord one thousand nine hundred and twenty-seven, before the Judges of said Court.

Witness the Hon. Benjamin N. Cardozo, Chief Judge, presiding.

Wm. J. Armstrong, Clerk.

REMITTITUR NOVEMBER 23, 1927

Duplicate

ERNEST CALDINE, as Admr., &c., Appellant,

ag'st

UNADILLA VALLEY RAILWAY COMPANY, Respondent

Be it Remembered, That on the 4th day of March in the year of our Lord one thousand nine hundred and twenty-seven, Ernest Caldine, as administrator &c., the appellant in this cause, came here unto the Court of Appeals, by Glenn F. Carter, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Unadilla Valley Railway Company, the respondent in said cause, afterwards appeared in said Court of Appeals by William H. Sullivan, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fols. d f] Whereupon, the said Court of Appeals having heard this cause argued by Mr. David F. Lee, of counsel for the appellant, and by Mr. William H. Sullivan, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of the Trial Term affirmed, with costs in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment of the Appellate Division be reversed and that of the Trial Term

affirmed, with costs in this court and in the Appellate Division, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany

November 23, 1927.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal Court of Appeals, State of New York.)

[fol. 1] In Court of Appeals of New York

Ernest Caldine, as Administrator of the Goods, Chattels, and Credits of Harold E. Caldine, Deceased, Plaintiff-Appellant,

against

Unadilla Valley Railway Company, Defendant-Respondent

Statement under Rule 234

This action was commenced by service of summons and complaint on the defendant on the 11th day of November, 1924.

The defendant appeared herein by William H. Sullivan, Esq., his attorney and served an amended answer to the complaint on the 26th day of January, 1925. The above title contains the names of the original parties in full and there has been no change in the parties. David F. Lee, Esq., was the attorney of record for the plaintiff at the time

of trial but since that time by due order of the Court, Glenn F. Carter, Esq., has been substituted as the attorney for the plaintiff-appellant. William H. Sullivan, Esq., is and has been at all times since the commencement of the action the attorney for the defendant.

[fol. 2] In Supreme Court of New York, Chenango County

Ernest Caldine, as Administrator of the Goods, Chattels and Credits of Harold E. Caldine, Deceased, Plaintiff,

vs.

Unadilla Valley Railway Company, Defendant

Summons

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in Chenango County.

Dated November 6, 1924.

David F. Lee, Plaintiff's Attorney. Office and Post Office address: 42 North Broad Street, Norwich, N. Y.

[fol. 3] In Supreme Court of New York, Chenango County

[Title omitted]

Complaint

The above-named plaintiff in this his complaint complains of the defendant and, for a cause of action, alleges, upon information and belief:

I. That at all the time and times hereinafter mentioned, the defendant was, and now is, a domestic railroad corporation, organized, incorporated and existing under and by virtue of the laws of the State of New York, and owning, managing, controlling and operating a steam railroad system, extending from the Village of New Berlin, New York, in a northerly direction to Bridgewater, New York, upon whose passenger and freight trains interstate commerce shipments are carried, and was engaged as a common carrier.

[fol. 4] II. That on or about the 25th day of June, 1924, plaintiff's intestate, Harold E. Caldine, was in the employ of the defendant and, as such, was engaged in the business of the defendant as a conductor in causing to be transferred from Bridgewater to New Berlin, New York, certain passengers, freight and express, a part of which freight and passengers were destined for points outside the State of New York, and, as such, the defendant was engaged in intestate commerce.

III. That on or about the 25th day of June, 1924, at about eight fifteen o'clock in the forenoon, while plaintiff's intestate was so employed and while he was so riding upon a train of the defendant at a point or place about one-fourth mile south of Bridgewater, New York, a train of cars, consisting of an engine and cars, owned or leased by and under the control of the defendant, its agents, servants and employees, ran into the train or coach upon which plaintiff's intestate was riding, and that by reason of such collision the plaintiff's intestate, Harold E. Caldine, received serious injuries which caused his death on said 25th day of June, 1924. That at the time of said collision, the train or coach upon which plaintiff's intestate was riding was being propelled in a southerly direction and the freight train which came into collision with said coach upon which plaintiff's intestate was riding was being caused to be propelled in a northerly direction on the same railroad track.

IV. Plaintiff further shows that on or about the 30th day [fol. 5] of June, 1924, limited letters of administration were duly granted to the plaintiff herein by Honorable Hubert C. Stratton, Surrogate of the County of Chenango, upon the

estate of said Harold E. Caldine, which limited letters gave the plaintiff authority to pursue the action herein set forth, and that upon said date the plaintiff herein entered upon his said duties as such administrator and ever since such time has continued to so act; that at the time of the death of said Harold E. Caldine he was a resident of the County of Chenango, State of New York, and said Surrogate had jurisdiction of the person and estate of said Harold E. Caldine and was duly authorized to issue and grant letters of administration herein.

V. Plaintiff further shows that the cause of said accident and death of plaintiff's intestate was the careless, negligent and unlawful conduct of defendant in that defendant failed to provide plaintiff's intestate with a safe place to work and failed to provide, promulgate and enforce proper and safe rules governing the conduct of the work in which plaintiff's intestate was engaged, and failed to give plaintiff's intestate proper and suitable warning of the approach of said freight train and failed to properly operate, manage and control the said freight train which ran into the coach and train upon which plaintiff's intestate was riding, which aforesaid freight train was run at a high, unlawful and dangerous rate of speed, and the employee of the defendant in charge of said freight train failed to observe and take into account the signals that were given, and ran past sig-
[fol. 6] nals, in consequence of which said freight train came in contact and collided with the coach in which plaintiff's intestate was riding; that the employees of the defendant failed to give the employees of said freight train proper or sufficient notice of the fact that the passenger coach in which plaintiff's intestate was riding was being caused to be propelled in a southerly direction along said tracks; that the employees of the defendant, in charge of giving orders to train employees, were negligent and careless in that they did not advise plaintiff's intestate that said freight train might be encountered in the event that the passenger coach upon which plaintiff's intestate was riding left the station at Bridgewater, New York, all by reason of which negligence the plaintiff's intestate received injuries, causing his death as hereinbefore set forth, and that said defendant was otherwise negligent.

VI. Plaintiff further shows that at the time said intestate met his death, he was engaged and employed by the defendant and in interstate commerce between the several states and territories of the United States and the Dominion of Canada and was so engaged at the time he received the injuries causing his death; that the aforesaid freight train was, at the time, being operated contrary to the rules and regulations of said defendant and in violation of the Federal Employers' Liability Act and the Safety Appliance Act, so called, of the United States of America.

VII. Plaintiff further shows that at the time said Harold E. Caldine met his death, he was engaged and employed by [fol. 7] the defendant in interstate commerce and that defendant was and now is a common carrier of passengers and freight for hire and was likewise, at the time, engaged in interstate commerce and its trains were run over tracks of the defendant and said defendant's trains, cars and coaches were engaged in carrying interstate freight and also traffic of and from various states in the United States of America and elsewhere, and in the operation of said train over and upon the tracks at the time and place aforesaid, the defendant was engaged in interstate commerce and was an interstate railroad corporation.

VIII. Plaintiff further shows that at the time of the injury and death of said Harold E. Caldine, he left him surviving, his father, Ernest Caldine, and this action is brought for the benefit of said Ernest Caldine, who, at the time of the death of said deceased, was dependent upon him for support.

IX. Plaintiff further shows that, in consequence of the said negligence of the defendant, as hereinbefore set forth, the said Ernest Caldine has been damaged and injured in the sum of Twenty-five thousand dollars ($25,000) and also in the sum of Four hundred dollars ($400) for funeral expenses.

X. Plaintiff further shows that the death of said Harold E. Caldine was caused solely by the negligence of the defendant and without any fault upon the part of the plaintiff's intestate.

XI. Plaintiff further shows that by virtue of Section 6 [fol. 8] of the Act of Congress passed on the 22nd day of April, 1908, and amended on the 5th day of April, 1910, jurisdiction was thus conferred upon the state courts of the State of New York to maintain this action.

Wherefore, plaintiff demands judgment against the defendant for the sum of Twenty-five thousand dollars, together with the costs and disbursements of this action.

David F. Lee, Plaintiff's Attorney. Office and Post Office address: 42 North Broad Street, Norwich, N. Y.

Duly sworn to by Ernest Caldine. Jurat omitted in printing.

[fol. 9] In Supreme Court of New York

[Title omitted]

Answer

The above-named defendant answers the complaint in the above-entitled action, and alleges the following facts constituting its defenses thereto, and respectfully shows to this Court, upon information and belief:

I. The defendant admits that at the times mentioned in the complaint, the defendant was and now is, a domestic railroad corporation, organized, incorporated and existing under and by virtue of the laws of the State of New York, and owning, managing, controlling and operating a railroad system extending from the Village of New Berlin, New York, in a northerly direction to Bridgewater, New York, and was engaged as a common carrier.

II. The defendant admits that on or about the 25th day of June, 1924, plaintiff's intestate, Harold E. Caldine, was [fol. 10] in the employ of the defendant and engaged in the business of the defendant as a conductor on one of its trains.

III. The defendant admits that on or about the 25th day of June, 1924, at about 8:15 o'clock in the forenoon, a train

on which plaintiff's intestate, Harold E. Caldine, was operating as conductor, ran into and collided with a freight train which was being operated in an opposite direction upon the same track.

IV. The defendant admits the allegations and statement set forth in paragraph of complaint numbered "IV."

V. The defendant denies each and every other allegation and statement set forth in paragraphs numbered "I," "II" and "III" of the complaint herein.

VI. The defendant denies each and every allegation and statement set forth in paragraphs numbered "V," "VI," "VII," "VIII," "IX," "X" and "XI" of the complaint herein.

VII. For a further defense, this defendant alleges that whatever injuries, if any, were sustained by the plaintiff's intestate in the accident mentioned in the complaint, they were caused by the careless and negligent acts of the plaintiff's intestate, his contributory negligence, and his disobedience to the rules and orders of the defendant.

VIII. For a further defense this defendant alleges that in so far as such injuries, if any, which were received by [fol. 11] the plaintiff's intestate in the accident mentioned in the complaint, and were not caused by his own negligence, and the acts of co-employees and other persons for whose acts the defendant is not responsible, they were caused by the ordinary risks of the business in which the plaintiff's intestate was then and there engaged, and which risks plaintiff's intestate had assumed and accepted in engaging in and remaining in the services and employment of the defendant.

IX. For a further defense and in recoupment of damages this defendant alleges that on or about the 25th day of June, 1924, plaintiff's intestate carelessly and negligently and in disobedience to and in disregard of the rules and orders of the defendant, so carelessly and negligently operated the coach, engine and train which the plaintiff's intestate was then and there engaged in operating as a conductor, that a collision with another train running in an opposite direction upon the same track was caused, and

by reason of the said careless and negligent acts of the said plaintiff's intestate, and by reason of the disobedience to and disregard of the specific orders of the defendant, the said plaintiff's intestate carelessly and negligently failed and neglected to give notice of the engineman and driver of the said engine and train of his duty to place the train of which the said plaintiff's intestate was the conductor, upon a siding for the purpose of meeting the freight train with which it collided, and by reason thereof this defendant sustained great injury and damage to its engines, cars, [fol. 12] coaches, tracks and equipment, and was compelled to pay large sums of money to passengers and other persons who were injured by the said careless and negligent acts of the plaintiff's intestate, and by reason of the said careless and negligent acts of the plaintiff's intestate, the defendant was compelled to withhold and withdraw from its service as a common carrier, one of its trains, all of which caused great injury and damage to the defendant in the sum of Fifty thousand dollars.

Counterclaim

For a counterclaim, this defendant alleges the following facts constituting its cause of action against the plaintiff, and respectfully shows to this Court:

X. That said plaintiff's intestate, Harold E. Caldine, died intestate at or near Bridgewater, Oneida County, N. Y., on the 25th day of June, 1924, and that at the time of his death the said plaintiff's intestate, Harold E. Caldine, was a resident of the County of Chenango; that on or about the 30th day of June, 1924, limited letters of administration were duly granted to the petitioner herein by Hon. Hubert C. Stratton, Surrogate of the County of Chenango, upon the estate of said Harold E. Caldine, and letters of administration were on said date duly issued to the plaintiff, Ernest Caldine, who duly qualified as such administrator and entered upon his duties as such administrator, and now is such administrator.

[fol. 13] XI. That the defendant now is, and at all of the times hereinafter mentioned was, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal office for

the transaction of business in New Berlin, Chenango Co., N. Y., and at all of the times hereinafter mentioned has been engaged in the operation of a railroad running from New Berlin, New York to Bridgewater, New York.

XII. That on or about the 25th day of June, 1924, the above-named plaintiff's intestate, Harold E. Caldine, was in the employ of the defendant as a conductor in the management and operation of one of the defendant's trains upon said railroad, upon which coach and train the defendant carried passengers, express, mail, baggage and other articles of commerce.

XIII. That on or about the 25th day of June, 1924, plaintiff's intestate, Harold E. Caldine, while engaged as conductor in the operation of one of defendant's trains and gasoline motor coach and car, in which the defendant was carrying passengers, freight, express, mail and baggage and other articles of commerce, carelessly and negligently disregarded and disobeyed the rules and orders of the defendant in not causing the said train and car of which the said plaintiff's intestate was the conductor, to be placed on a switch of said track for the purpose of meeting another of defendant's trains which was approaching the same point on the same tracks on which the plaintiff's intes- [fol. 14] tate was operating the said train and car, and the said plaintiff's intestate carelessly and negligently failed and neglected to advise and call the attention of the engineman and driver of the said engine and train to take the siding for the purpose of meeting the approaching train upon the same tracks, and by reason of which careless and negligent acts of the said plaintiff's intestate, a collision was caused between the said train of which the plaintiff's intestate was the conductor and another train approaching upon the same track, causing great injury and damage to the defendant's engines, cars, coaches, tracks and equipment, and seriously injuring several passengers who were being carried on said train so operated by the plaintiff's intestate, and causing the death of plaintiff's intestate and one other person, and by reason of the said careless and negligent acts of the plaintiff's intestate, this defendant was compelled to and did pay large sums of money to the passengers who were so injured by reason of the said care-

less and negligent acts of the plaintiff's intestate, and the defendant was compelled to pay and become liable for large sums of money in defending legal proceedings and in adjusting the damages so caused by the said careless and negligent acts of plaintiff's intestate.

XV. That the said damages and injuries hereinbefore set forth were caused solely by the said careless and negligent acts of the plaintiff's intestate and co-employee, and that the defendant was free from any negligence which contributed in any way to the said injury and damage herein mentioned.

[fols. 15 & 16] XVI. That by reason of the facts aforesaid and the said careless and negligent acts of the plaintiff's intestate as hereinbefore stated, this defendant has sustained injury and damage in the sum of Fifty thousand dollars.

Wherefore, the defendant demands judgment that the complaint herein and this action be dismissed, and that the defendant have affirmative judgment against the plaintiff and the estate of the said Harold E. Caldine, deceased, for the sum of Fifty thousand dollars, together with the costs and disbursements of this action.

Wm. H. Sullivan, Defendant's Attorney. Office & Post Office Address: Norwich, Chenango Co., New York.

Duly sworn to by Harry A. Brome. Jurat omitted in printing.

[fol. 17] In Supreme Court of New York, Chenango County

[Title omitted]

Amended Complaint

The above-named plaintiff, in this his amended complaint, complains of the defendant and alleges, upon information and belief:

I. That at all the time and times hereinafter mentioned, the defendant was, and now is, a domestic railroad corpora-

tion, organized, incorporated and existing under and by virtue of the laws of the State of New York, and owning, managing, controlling and operating a steam railroad system, extending from the Village of New Berlin, New York, in a northerly direction to Bridgewater, New York, upon whose passenger and freight trains interstate commerce shipments are carried, and was engaged as a common carrier.

II. That on or about the 25th day of June, 1924, plain-[fol. 18] tiff's intestate, Harold E. Caldine, was in the employ of the defendant and, as such, was engaged in the business of the defendant as a conductor in causing to be transferred from New Berlin, New York, to Richfield Junction, New York, and from Richfield Junction, New York, to New Berlin, New York, and to and from other places, certain passengers, freight, mail and express, a part of which passengers, freight, mail and express were destined for points outside the State of New York, and a part of the passengers, freight, mail and express transferred from points outside the State of New York to places with- the State of New York, and the train on which plaintiff's intestate worked completed said interstate commerce shipments and, as such, the defendant was engaged in interstate commerce.

III. That on or about the 25th day of June, 1924, at about eight fifteen o'clock in the forenoon, while plaintiff's intestate was so employed and while he was so riding upon a train of the defendant at a point or place about one-fourth mile south of Bridgewater, New York, a train of cars, consisting of an engine and cars owned or leased by and under the control of the defendant, its agents, servants and employees, ran into the train or coach upon which plaintiff's intestate was riding, and that by reason of such collision the plaintiff's intestate, Harold E. Caldine, received serious injuries which caused his death on said 25th day of June, 1924. That at the time of said collision, the train or coach upon which plaintiff's intestate was riding was being pro-[fol. 19] pelled in a southerly direction and the freight train which came into collision with said coach upon which plaintiff's intestate was riding was being caused to be propelled in a northerly direction on the same railroad track.

IV. Plaintiff further shows that on or about the 30th day of June, 1924, limited letters of administration were duly granted to the plaintiff herein by Honorable Hubert C. Stratton, Surrogate of the County of Chenango, upon the estate of said Harold E. Caldine, which limited letters gave the plaintiff authority to pursue the action herein set forth, and that upon said date the plaintiff herein entered upon his said duties as such administrator and ever since such time has continued to so act; that at the time of the death of said Harold E. Caldine he was a resident of the County of Chenango, State of New York, and said Surrogate had jurisdiction of the person and estate of said Harold E. Caldine and was duly authorized to issue and grant letters of administration herein.

V. Plaintiff further shows that the cause of said accident and death of plaintiff's intestate was the careless, negligent and unlawful conduct of defendant in that defendant failed to provide plaintiff's intestate with a safe place to work and failed to provide, promulgate and enforce proper and safe rules governing the conduct of the work in which plaintiff's intestate was engaged, and failed to give plaintiff's intestate proper and suitable warning of the approach of said freight train and failed to properly operate, manage and control the said freight train which ran into the coach [fol. 20] and train upon which plaintiff's intestate was riding, which aforesaid freight train was run at a high, unlawful and dangerous rate of speed, and the employees of the defendant in charge of said freight train failed to observe and take into account the signals that were given, and ran past signals, in consequence of which said freight train came in contact and collided with the coach in which plaintiff's intestate was riding; that the employees of the defendant failed to give the employees of said freight train proper or sufficient notice of the fact that the passenger coach in which plaintiff's intestate was riding was being caused to be propelled in a southerly direction along said tracks; that the employees of the defendant, in charge of giving orders to train employees, were negligent and careless in that they did not advise plaintiff's intestate that said freight train might be encountered in the event that the passenger coach upon which plaintiff's intestate was rid-

ing left the station at Bridgewater, New York; that the defendant, its agents, servants and employees were negligent and careless in that, just prior to and at the time of the aforesaid collision, the motorman or engineer upon the train upon which plaintiff's intestate was riding was not at his place of duty and was not in a position to stop his engine and train and thus avoid the collision aforesaid; that the defendant, its agents, servants and employees were negligent and careless in that they did not provide a sufficient number of employees to properly handle the aforesaid trains that came into collision; that the defendant, its agents, servants and employees were negligent and careless [fol. 21] in that they employed at the various stations on its railroad, an insufficient number of employees, and that those whom they did employ were incompetent to perform the duties of train dispatchers and operators; that defendant was negligent in not having a telegraph system between stations; that the defendant, its agents, servants and employees were negligent in that the cars and engines that came into collision were not properly or sufficiently equipped with proper or sufficient brakes, couplers or other equipment used for the stopping of engines and cars; that defendant, its agents, servants and employees were negligent in that brakes used upon the engines and cars that came into collision were not properly inspected and the defects in the brakes and equipment on said cars and engines could have been discovered by reasonable and diligent inspection; that the defendant, its officers, agents, servants and employes were negligent and careless in having a defective roadbed and one that was not in proper repair—all by reason of which negligence the plaintiff's intestate received injuries, causing his death as hereinbefore set forth, and that said defendant was otherwise negligent.

VI. Plaintiff further shows that at the time said intestate met his death, he was engaged and employed by the defendant in interstate commerce between the several states and territories of the United States and the Dominion of Canada and was so engaged at the time he received the injuries causing his death; that the aforesaid freight train was, at the time, being operated contrary to the rules and [fol. 22] regulations of said defendant and in violation of

the Federal Employers' Liability Act and the Safety Appliance Act, socalled, of the United States of America.

VII. Plaintiff further shows that at the time said Harold E. Caldine met his death, he was engaged and employed by the defendant in interstate commerce and that defendant was and now is a common carrier of passengers and freight for hire and was likewise, at the time, engaged in interstate commerce and its trains were run over tracks of the defendant and said defendant's trains, cars and coaches were engaged in carrying interstate baggage, mail and freight, and also traffic of and from various states in the United States of America and elsewhere, and in the operation of said train over and upon the tracks at the time and place aforesaid, the defendant was engaged in interstate commerce and was an interstate railroad corporation.

VIII. Plaintiff further shows that at the time of the injury and death of said Harold E. Caldine he left him surviving, his father, Ernest Caldine, and this action is brought for the benefit of said Ernest Caldine, who, at the time of the death of said deceased, was dependent upon him for support.

IX. Plaintiff further shows that, in consequence of the said negligence of the defendant, as hereinbefore set forth, the said Ernest Caldine has been damaged and injured in the sum of Twenty-five thousand dollars ($25,000) and also in the sum of Four hundred dollars ($400) for funeral expenses.

[fol. 23] X. Plaintiff further shows that the death of said Harold E. Caldine was caused solely by the negligence of the defendant and without any fault upon the part of plaintiff's intestate.

XI. Plaintiff further shows that by virtue of Section 6 of the Act of Congress, passed on the 22nd day of April, 1908, and amended on the 5th day of April, 1910, jurisdiction was thus conferred upon the state courts of the State of New York to maintain this action.

Wherefore, plaintiff demands judgment against the defendant for the sum of Twenty-five thousand, four hundred

dollars ($25,400), together with the costs and disbursements of this action.

David F. Lee, Plaintiff's Attorney. Office and Post Office Address 42 North Broad Street, Norwich, N. Y.

Duly sworn to by Ernest Caldine. Jurat omitted in printing.

[fol. 24] In Supreme Court of New York, County of Chenango

[Title omitted]

Answer to Amended Complaint

The above-named defendant answers the amended complaint in the above-entitled action, and alleges the following facts constituting its defenses thereto, and respectfully shows to this Court, upon information and belief:

I. The defendant admits that at the times mentioned in the complaint, the defendant was and now is, a domestic railroad corporation, organized, incorporated and existing under and by virtue of the laws of the State of New York, and owning, managing, controlling and operating a railroad system extending from the Village of New Berlin, New York, in a northerly direction to Bridgewater, New York, and was engaged as a common carrier.

II. The defendant admits that on or about the 25th day of June, 1924, plaintiff's intestate, Harold E. Caldine, was in the employ of the defendant and engaged in the business [fol. 25] of the defendant as a conductor on one of its trains.

III. The defendant admits that on or about the 25th day of June, 1924, at about 8:15 o'clock in the forenoon, a train on which plaintiff's intestate, Harold E. Caldine, was operating as conductor, ran into and collided with a freight train which was being operated in an opposite direction upon the same track.

IV. The defendant admits the allegations and statement set forth in paragraph of complaint numbered "IV."

V. The defendant denies each and every other allegation and statement set forth in paragraphs numbered "I," "II," and "III" of the complaint herein.

VI. The defendant denies each and every allegation and statement set forth in paragraphs numbered "V," "VI," "VII," "VIII," "IX," "X" and "XI" of the complaint herein.

VII. For a further defense, this defendant alleges that whatever injuries, if any, were sustained by the plaintiff's intestate in the accident mentioned in the complaint, they were caused by the careless and negligent acts of the plaintiff's intestate, his contributory negligence, and his disobedience to the rules and orders of the defendant.

VII. For a further defense this defendant alleges that in so far as such injuries, if any, which were received by the [fol. 26] plaintiff's intestate in the accident mentioned in the complaint, and were not caused by his own negligence and the acts of co-employees and other persons for whose acts the defendant is not responsible, they were caused by the ordinary risks of the business in which the plaintiff's intestate was then and there engaged, and which risks plaintiff's intestate had assumed and accepted in engaging in and remaining in the services and employment of the defendant.

IX. For a further defense and in recoupment of damages this defendant alleges that on or about the 25th day of June, 1924, plaintiff's intestate carelessly and negligently and in disobedience to and in disregard of the rules and orders of the defendant, so carelessly and negligently operated the coach, engine and train which the plaintiff's intestate was then and there engaged in operating as a conductor, that a collision with another train running in an opposite direction upon the same track was caused, and by reason of the said careless and negligence acts of the said plaintiff's intestate, and by reason of the disobedience to and disregard of the specific orders of the defendant, the said plaintiff's intestate carelessly and negligently failed

and neglected to give notice to the engineman and driver of the said engine and train of his duty to place a train of which the said plaintiff's intestate was the conductor, upon a siding for the purpose of meeting the freight train with which it collided, and by reason thereof this defendant sustained great injury and damage to its engines, cars, coaches, tracks [fols. 27 & 28] and equipment, and was compelled to pay large sums of money to passengers and other persons who were injured by the said careless and negligent acts of the plaintiff's intestate, and by reason of the said careless and negligent acts of the plaintiff's intestate, the defendant was compelled to withhold and withdraw from its service as a common carrier, one of its trains, all of which caused great injury and damage to the defendant in the sum of Fifty thousand dollars.

Wherefore, the defendant demands judgment that the complaint herein and this action be dismissed, and that the defendant have affirmative judgment against the plaintiff for the costs and disbursements of this action.

Wm. H. Sullivan, Defendant's Attorney, Office & Post Office address, Norwich, Chenango Co., New York.

Duly sworn to by Harry A. Brome. Jurat omitted in printing.

[fol. 29] In Supreme Court of New York, Chenango County, September 8, 1925

[Title omitted]

Case and Exceptions

Appearances of Counsel

David F. Lee, Esq., attorney for the plaintiff.
William H. Sullivan, Esq., attorney for the defendant.

Colloquy

Mr. Lee: I object to the question of counsel to the jury and ask it be taken on the record.

Mr. Sullivan: Do you appreciate Mr. Doolittle (a juror), that not all accidents that happen on a railroad create a cause of action, is that so?

[fol. 30] Juror: I do.

Mr. Sullivan: And that in order to entitle this plaintiff to recover he must show that the defendant was negligent?

Juror: Yes.

Mr. Sullivan: And unless they show that your verdict will be no cause of action?

Juror: Yes.

Mr. Sullivan: If it should be proven to your satisfaction that the entire accident was caused by the negligence of the plaintiff's intestate, the man who was killed, that he could not recover; you appreciate that?

Juror: I do.

Mr. Lee: Of course, he changed his question this last time so I do not care to have it all taken.

The Court: Very well.

Mr. Sullivan: If any question of comparative contributory negligence between this decedent, this conductor and any other employee of the railroad was submitted to you, and the Court should say you should deduct a certain amount of damages for the negligence of the plaintiff in this case, if it should appear that the negligence of the plaintiff caused this defendant $25,000 damages would you take that fact into consideration in arriving at your verdict; if it should appear that the negligence of this deceedent compelled the defendant to pay to passengers, and damages to its cars and equipment, if it cost the company $25,000 would you take that fact into consideration in arriving at your verdict?

Juror: If he was negligent?

Mr. Sullivan: Yes.

Juror: I would.

[fol. 31] Mr. Sullivan (to Juror No. 7): If you were to sit as a juror in this case and somebody attempted to talk to you outside of court about the merits of the case or talked about it in your presence would you walk away from him and report it to the Court?

Juror: I don't think I would.

Mr. Sullivan: What would you do, stay and listen?

Juror: Probably should, yes.

Mr. Sullivan: If the Court told you that was improper would you still do it?

Juror: Probably not.

The Court: I feel like saying to the jury, all of them, gentlemen, you should try and determine this case solely on the evidence offered in the court room. If any one should talk to you about it or in your presence it is your duty to leave because it might influence your mind, and because it would look queer for any one to come up and go to talking to a juror in a case; the motive might be questioned what they wanted; just the same as it is with the Judge. If some fellow came up and tried to tell me how I should decide a case I probably would get mad and not only that but go away from him. So that is your duty.

Mr. Sullivan: Would you be willing to instruct the jury if anybody persisted in discussing the case in their presence it should be reported to you.

The Court: Yes, it is your duty to report it to me; if they should persist in it their motive is certainly wrong.

Jury empanelled.

Recess until 9:30 A. M., Sept. 9, 1925.

[fol. 32] Sept. 9, 1925, 9:30 A. M., case resumed.

Mr. Lee opens the case for the plaintiff.

Mr. Sullivan opens the case for the defendant.

Mr. Lee: May I ask if there is any question about the fact that on or about the 30th of June, 1924, that limited letters of administration were duly granted by the Surrogate of Chenango County upon the estate of Harold E. Caldine.

Mr. Sullivan: I concede it.

Mr. Lee: And that he, the father, is still acting as such.

Mr. Sullivan: Yes. I also state to you that I admit that the decedent, Harold E. Caldine, was killed on the 25th of June, 1924, in this accident at Bridgewater, and that his death was caused by injuries received in that accident; not the cause of the accident. You need not swear any doctors or anything like that.

Mr. Lee: You say as a result of the injuries received in the collision which we both mentioned that his death was caused.

Mr. Sullivan: Yes, at that accident at Bridgewater.

Mr. Lee: May I ask on the question of the company being engaged in interstate commerce at the time, and deceased being engaged in it, whether you will admit it or whether we will have to prove it.

Mr. Sullivan: We concede that we were engaged in interstate commerce at the time of the accident.

The Court: Stipulation as to the letters, as to the death, [fol. 33] and that the defendant and plaintiff's intestate were engaged in intrastate commerce at the time of the occurrence.

Mr. Sullivan: Yes.

Henry P. Clark, witness on behalf of the plaintiff, being duly sworn, testified as follows:

Q. Where do you live?

A. Unadilla Forks.

Q. You are in Otsego County, that end of the line?

A. Yes.

Q. What is your occupation?

A. I am station agent for the Unadilla Valley R. R. Co.

Q. At what place?

A. River Forks station.

Q. How far south of Bridgewater is River Forks?

A. Well, I am not positive as to the exact distance, something over two miles, a little.

Q. Were you at your post, as station agent, on the morning of June 25, 1924, last?

A. Yes.

Q. A year ago last June?

A. Yes.

Q. Do you remember when Train 15, this freight going north, of coming into your station?

A. Yes, sir.

Q. About what time did it get in there?

A. Something just before eight o'clock.

Q. Just before eight?

A. Yes.

Q. Was it a little late that morning?

A. I don't know.

Q. You don't know?

A. I don't remember.

The Court: What date was this?
Mr. Lee: June 25, 1924.

Q. What is the name of the conductor, on the freight train?
A. Mr. Risley.
Q. What is his first name?
A. Frank Risley.
[fol. 34] Q. Did you see Frank that morning?
A. Yes.
Q. What did you observe him do?
A. He came into the office and went to the telephone and called Bridgewater, asked them if the gas car had arrived, and I don't know, of course, what the answer was. I only heard his end of the conversation, and he says——

Mr. Sullivan: How is this material, I don't want to be technical or exclude anything that is material; here is a telephone conversation that he heard Risley talking with someone up there.

Objection overruled. Exception.

Mr. Lee: I will connect it up.

Q. Go on?
A. He told the agent at Bridgewater to hold gas car, that he was coming with the freight; started right out and got on the train and went.
Q. You haven't any telegraph system on your line, is there?
A. No, sir.
Q. The way you get in touch from one station to another is by telephone?
A. Yes.
Q. River Forks, you say, is about two miles south of Bridgewater?
A. Yes, sir.
Q. You knew Mr. Caldine, didn't you?
A. Yes, sir.
Q. On other occasions, prior to June 25, 1924, did you know of the freight train and the car upon which Caldine was conductor meeting at River Forks?

Objected to as incompetent, immaterial, irrelevant.
Objection overruled. Exception.

[fol. 35] A. Yes, I have known them to meet there.

Q. The train had been running from along the latter part of April, a little over two months? About two months?

A. Yes.

Q. Did they meet several times at your station?

A. Occasionally.

Q. Do you know of their meeting below your place often, down further towards New Berlin?

A. I have no recollection of any date.

Q. Did you hear the collision?

A. I did not.

Q. Did you hear of the collision afterwards?

A. Afterwards, yes.

Q. At what time?

A. I can't tell you exactly but it was shortly after the accident.

Q. Did the Bridgewater agent, or anybody else north of you on the line, or at any place, telephone or advise you at any time to hold the freight or try to hold it at River Forks?

A. No, sir.

Q. So, you had no knowledge whatever about holding the freight train that was in your station?

A. No, sir.

Cross-examination by Mr. Sullivan:

Q. How long have you been station agent at River Forks?

A. Seven years, a little over.

Paper market Exhibit 1 for identification.

Q. I show you Exhibit 1 for identification and ask you what that is?

A. Time-table of the railroad company.

Q. What number?

A. No. 67.

[fol. 36] Q. What date effective?

A. Sunday, April 23, 1924.

Q. Is that the time card which governed the operation of trains on the Unadilla Railway Company June 25, 1924?

A. I think so, yes.

Q. Is there any doubt about it in your mind?

A. Well, I don't know, I think it is.

Q. Look it over and see?
A. I think it was.
Q. That is a schedule under which trains were operated?
A. Yes.
Q. At that time?
A. Yes.
Q. What was the number of the freight train?
A. No. 15.
Q. Is it shown on the extreme right column of the time card?
A. Yes.
Q. What number was the gasoline car on the particular trip?
A. No. 2.
Q. Now, there is 8-72 before that 2, what does that 8-72; is that the 8-72 there?
A. If I understand it right this 8-72 was the train on the Delaware, runs from Richfield Junction to Bridgewater.
Q. And the dash is the two?
A. Yes.
Q. Were the rules, the printing at the bottom of all the time cards?

Objected to.

Q. You saw?

Objected to calling them rules.
The Court: Sustained. Show whether the printing is on there.

(Question read.)

Objected to.
The Court: Sustained. Show whether the printing is on there.
Exception.

[fol. 37] Q. Was the printing on the bottom of this time card there on all the time cards you saw of this issue?
A. Yes.
Q. Did you see one of these time cards in the hands of all the employees that passed through or by your station?
A. I did not.
Q. You don't know personally whether Caldine had one or not?

A. I do not.

Q. No. 2 stopped at your station?

A. Yes, sir.

Q. And was due to arrive there at 8:18 in the morning?

A. Yes, sir.

Q. How long have you been in the employ of the railroad?

A. Seven years, from April 1st to the present time, over seven years.

Q. For this defendant?

A. Yes.

Q. All the time at River Forks?

A. Yes, sir.

Q. You say you don't know who Risley talked with at the upper end?

A. I do not.

FRANK RISLEY, witness on behalf of the plaintiff, being duly sworn, testified as follows:

Q. Mr. Risley, you live where?

A. New Berlin.

Q. You are acquainted with the last witness, Mr. Clark?

A. Yes, sir.

Q. Both you and he are still employed by the Unadilla Valley Railroad Company?

A. Yes.

Q. That is, he is still agent, station agent at River Forks?

A. Yes.

Q. And you are, at the present time, a conductor?

A. Yes, sir.

[fol. 38] Q. For this railroad company?

A. Yes, sir.

Q. On the morning of June 25, 1924, on what train were you a conductor?

A. Train 15.

Q. What was the nature, what kind of a train was that?

A. Freight train.

Q. Of what did it consist?

A. Oh, it was a mixed train, box cars, I don't just remember what there was; we had a coach.

Q. How many cars did you have?

A. Why, as near as I can say, five or six cars.

Q. Practically freight?

A. Yes.

Q. You say you had a coach; you mean a passenger coach?

A. Passenger coach but we didn't carry passengers.

Q. Really your train was a freight train?

A. Yes, a freight train.

Q. And not a passenger train?

A. No.

Q. When you got to River Forks that morning did you stop there?

A. Yes.

Q. Your train?

A. Yes, sir.

Q. What did you do?

A. I went in and called the agent at Bridgewater and told him we were coming, to hold gas car.

Q. Did you know the station agent at Bridgewater?

A. Yes, sir.

Q. What is his name?

A. Ray Dawson.

Q. Do you know his voice?

A. Yes, sir.

Q. Did you know the fellow you talked with that morning was the agent, didn't you?

A. Yes, sir.

Q. What was it you said to him over the phone and what did he say to you?

A. I couldn't tell you word for word, only I called him up as I did every morning, or practically every morning, to let him know we were coming.

[fol. 39] Q. Would your recollection be better next day afterwards when the coroner talked with you than this morning? Didn't you tell him to hold gas car until you got there?

Objected to cross-examining his own witness, and improper.

Objection overruled. Exception.

Q. Didn't you tell the station agent at Bridgewater to hold gas car until you people got there?

A. I think that is what I told him, as near as I can remember.

Q. After you talked with him what did you do?

A. I went out and give the engineer a highball and we left.

Q. Highball is a signal to go ahead?

A. Yes.

Q. Is that what you call it?

A. Yes.

Q. Your train went on north?

A. Yes, sir.

Q. As you were going north what was the first that came to your attention of the gas car coming south?

A. I felt brakes applied on the train.

Q. May I ask first, when you telephoned the station agent at Bridgewater did you ascertain whether the car had got there or not when you phoned?

A. I can't just remember whether I did or not. No, I forget if I did.

Q. What is that?

A. I can't just tell. As near as I can tell I asked him if the gas car had got there and hold the train for we were coming.

Q. Did he tell you that the car had got in from the north to that station yet or not?

A. He said, "All right, come on."

Q. He said, "All right, come on," to you anyway?

A. Yes.

[fol. 40] Q. After he told you that you went out and started?

A. Yes.

Q. How far had you got north from River Forks before you noticed the brakes go on?

A. Just before we hit the gas car.

Q. Tell them where your train hit the gas car?

A. The distance you mean?

Q. About where it was you hit them?

A. Just a short distance out of the yard. I couldn't tell you just how far, less than a quarter of a mile.

Q. The yards and all that don't mean much; about how far south of the Bridgewater station is that where the collision was?

A. I should say that was less than a quarter of a mile.

Q. Would you say about a fifth of a mile?

A. Yes.

Q. About where it is on the corner, approximately?

A. Oh, yes, I should say so.

Q. It is nearly down to what you call Scott's crossing?

A. It was right in Scott's cut.

Q. The place where it happened there is a sort of curve in the road or was at that time?

A. Yes, a reverse curve right in there.

Q. What part of the train were you on when the collision took place?

A. In the coach, rear end.

Q. Did you go to where the collision was?

A. Just as soon as I could, yes.

Q. Did you see Caldine when you got there?

A. I see Dibble and then I went into the car and to find Caldine or see what happened in there and I see his hat on the floor and I pawed around and found his arm; of course, I wasn't dead sure it was him, but I took it for granted it was him.

[fol. 41] Q. Was he dead when you got in there?

A. He was under the rubbish when I got in there, as far as being dead I can't say about that.

Q. Where was his hat?

A. Under the baggage car door.

Q. Was the door open between the passenger car and baggage car part?

A. I wouldn't say; no, I wouldn't say whether it was open or not.

Q. Dibble's occupation was what on the gas car coming south?

A. Motorman.

Q. What is his first name?

A. Arthur.

Q. Arthur Dibble was motorman?

A. Yes.

Q. And Harold Caldine, the deceased, was the conductor on that train?

A. Yes, sir.

Q. Do you know what pay Mr. Caldine received as conductor?

A. No, I do not.

Q. Who else did you notice in the passenger train going south as passengers?

A. Miss Hilda Jenkins, an oldish man, Elting.

Q. Hezekiah Elting?

A. I don't know his first name, and another young woman in there, I don't know whether her name was Elting. She was related to him anyway. That is all I see.

Q. Was anybody on this train?

A. Not that I saw.

Q. Prior to leaving River Forks or any place down there had you received any notice or anything else to hold your train at River Forks or any place?

A. No, sir.

Q. From any place north of River Forks?

A. No, sir.

Q. What time was your train due at Bridgewater?

A. Eight o'clock.

Q. What time was it you left River Forks?

[fol. 42] A. Just eight o'clock when I jumped off the coach and went in to telephone to Bridgewater.

Q. Just eight o'clock?

A. Yes.

Q. So that you, between the time you left River Forks and going up the line, your train was that much late, wasn't it, to Bridgewater, on the way going north?

A. We wasn't late. We were late in Bridgewater. We were due in there eight o'clock. We left River Forks at eight. It might have been a minute after eight because it was eight when I went in there and called him up.

Q. So that your train would have arrived somewhat late in Bridgewater that morning?

A. We would have been five minutes late if we hadn't had hindrances. Late going up.

Q. What do you mean by hindrances?

A. We had section men on and we had to stop and let them off, we weren't looking for.

Q. Did you do that?

A. Yes.

Q. So that between River Forks and the scene of this occurrence you had let men off?

A. Yes, I couldn't say we stopped. We slowed down to let them off on the grade there.

Q. Do you know what time the collision took place?

A. I would say it was about 8:10 or 8:12. About that.

Q. Do you know, as matter of fact, the watches of Caldine and some others showed, his watch found, it was 8:16?

A. I don't think it was 8:16.

Q. It was after 8:10?

A. Somebody said his watch said it was 8:12.

Q. How fast was your train going when the collision took place?

A. Oh, that is kind of a hard question to answer. Sitting [fol. 43] in the train you can't tell how fast the train is going.

Q. Approximately?

A. The engineer is a slow, careful runner, I don't think——

Mr. Lee: Objected to and moved to strike it out.

The Court: Strike it out.

Q. Approximately what rate of speed was the train going?

A. Possibly 18 or 20 miles an hour.

Q. How far did the train go after it struck the gas car?

A. Why, not but a few feet.

Q. How far would you say, you say a few feet?

A. I can't tell just how far. I can't remember as to that.

Q. What would be your best judgment?

Objected to, the witness has stated that he can't say, and he is asking his own witness.

Mr. Lee: He isn't my witness. I subpoenaed him.

Objection overruled. Exception.

A. Maybe 10 feet and maybe 20 feet, I couldn't say.

Q. Did you notice when the brakes went on whether the train you were on stopped sudden or not, or slid along some that morning?

A. Stopped as quick as you can stop any train.

Q. How was the brakes working that morning?

A. Working good.

Q. Didn't you have trouble with the brakes that morning?

A. No.

Q. Would you know as much about it as the engineer?

[fol. 44] A. I would know whether the brakes were working on the train.

Objected to as incompetent, immaterial, irrelevant as to whether he would know as much about it as the engineer.

Objection overruled. Exception.

Q. The train did go some distance after the collision?

A. Yes.

Q. Did you notice whether the gas car had been backed up some?

A. A very little, not very much.

Q. Was it crushed in?

A. Oh, yes.

Cross-examination by Mr. Sullivan:

Q. How long have you been in the employ of the defendant?

A. Oh, I went to work for them 25 or 26 years ago.

Q. What is that?

A. 25 or 26 years.

Q. You have been engaged in the capacity of conductor how long?

A. Why, possibly 12 or 14 years.

Q. I show you Exhibit 1 for identification, and ask you if that is the time card under which the trains on the defendant's railroad was operating on June 25, 1924?

A. Yes, sir.

Q. And is that all the printing on the face of that card, was that on all the time cards that was issued at that time, or with this issue at the time of this time table?

A. It was on all I saw of them.

Q. Do you know whether you personally saw Caldine's time card; did you ever see him pull it out or use it?

[fol. 45] A. No, I don't know as I ever did.

Exhibit 1 offered and received in evidence.

Q. Are you familiar with the Bridgewater yard?

A. Yes, sir.

Q. Showing the defendant's railroad in and around Bridgewater?

A. Yes.

Q. The Bridgewater yard; what do you say whether or not that is a correct, substantially correct representation of the location of the defendant's tracks in and about the Bridgewater station?

A. Yes, it is all right. It is like it.

Q. The depot at Bridgewater is a joint depot used by the Lackawanna Railroad and Unadilla Railroad?

A. Yes, sir.

Q. And the tracks on the north side of the building it is marked as a square, the depot; are those the Lackawanna Railroad tracks?

A. Yes.

Q. And on the south side that ran to the curve and turned southerly towards New Berlin, those are the Unadilla Valley tracks?

A. Yes.

Q. Tracks doesn't appear here, does it?

A. I don't think so.

Q. Where did the accident occur, where did the collision occur? Where is the curve you speak of as Scott's curve?

A. The curve don't show here just like it is in the curve.

Q. Is this it, W. J. Scott, I presume that cut may be named after him, W. J. Scott owned the adjoining land and did at that time; is that the curve?

A. It don't look just like the curve.

Q. I presume it looks different on the rails than on the paper?

[fol. 46] A. Is this the river coming here?

Q. Yes.

A. Well, it was right about here.

Q. It was about the point of the triangle?

A. Yes.

Q. With the words E. McDermott at the end of it?

A. Yes.

Mr. Sullivan: Mr. Munson drew this map and it is marked on there 200 feet to the inch. Have you any objection to introducing it in evidence?

Mr. Lee: I haven't any objection to you using it now, and if anything you want to supplement you may afterwards.

Map marked Exhibit 2. Offered and received in evidence.

Q. I call your attention to the round circle in which there is the letter A. That appears to be south of the Lackawanna tracks and south of the depot.

A. Yes.

Q. Is that the switch?

A. Yes, that is turntable switch.

Q. The switch on which you were to go, to take the siding, to let No. 2 pass, isn't it?

A. Yes.

Q. I call your attention to Exhibit 1, and printing at the bottom, "Train 15 will take turntable siding at Bridgewater to allow Train 2 to pass"?

A. Yes.

Q. And then Train No. 2 will pass 15 at Bridgewater yard?

A. Yes.

Q. What does that mean?

A. It means——

[fol. 47] Objected to as a conclusion, inadmissible, that the time-table itself is best evidence.

Objection overruled. Exception.

Q. What does it mean?

A. It means Bridgewater is positive meeting place for her.

Q. What do you call the printing at the bottom, are those rules or orders or what?

Objected to as incompetent, inadmissible evidence.

Q. What was your information in the railroad operation?

A. They are orders.

Q. Are those rules that are positive?

A. Yes.

Objected to as conclusion, incompetent, immaterial, irrelevant, inadmissible evidence.

Objection sustained.

Q. You have been a conductor how long?

A. I should say 12 or 14 years.

Q. And familiar with the duties of conductor on the Unadilla Railroad Company?

A. Yes, sir.

Q. And the rules and regulations governing the same?
A. Yes.
Q. In the rules governing the operation of conductors on railroads, including the defendant, who has charge of the operation and movement of a train?

Objected to as incompetent, immaterial, irrelevant, inadmissible.
Objection sustained. Exception.

Q. What are the conductor's duties in the operation of [fol. 48] trains on the Unadilla Valley Railroad?
A. He has to see that the train is made up properly, and have charge of it.
Q. Have charge of it?
A. Yes.
Q. What do you mean by that, have charge of its operation and movement?
A. Yes, everything.
Q. Everything?
A. Yes, sir.
Q. Can the engineer start a train without a signal from the conductor?
A. No, sir.
Q. And that has always been the rule on the Unadilla Railroad?
A. Yes, sir.
Q. And it was on June 25, 1924?
A. Yes, sir.

Redirect examination:

Q. Did you ever work on any other railroad?
A. No.
Q. You did go up on the Delaware Railroad, on that road, on the Delaware tracks?
A. Did at that time.
Q. From Bridgewater to the Junction?
A. Yes.
Q. Up through there you had rules, didn't you?
A. I wasn't going up through.
Q. You didn't go up there?
A. No.
Q. Did you have a book of rules at all?
A. At that time time-table rules was all we had.

Q. Did you have a book of rules?

A. No.

Q. Did you ever work on any other railroad?

A. No.

Q. You know, as a matter of fact, conductors and others have what is called standard rules, don't they?

A. Oh, yes, they do.

[fol. 49] Q. Are you familiar with those?

A. Well, partly.

Q. But you don't pretend to be fully; have you full knowledge of them?

A. I have never seen many that was yet.

Q. Is this railroad, Unadilla Valley through there, any of the block signal system on it at all in the yards?

A. No.

Q. Is there any of the semaphore signal system at all?

Objected to as incompetent, immaterial, irrelevant.

Objection overruled. Exception.

A. No.

Q. At no place along the line?

A. No.

Q. And hasn't in the lower yard at Scott's or below Bridgewater?

A. No.

Q. I call your attention, so we all understand this time-table; this is Unadilla Valley Railroad Company, isn't it?

A. Yes.

Q. And says time-table?

A. Yes.

Q. No. 67?

A. Yes.

Q. That is a time-table, isn't it?

A. Yes.

Q. You say Train 2, 87-2 the one going down?

A. Yes.

Q. Is that the train which Caldine was on?

A. It was.

Q. What time does it show on there; 8:10 leaving time at Bridge water?

A. Yes.

Q. That train, No. 2, here is the one Caldine had?

A. Yes.

Q. The one at the right of this time-table, No. 15, is your train?

A. Yes.

[fol. 50] Q. You left New Berlin 6:30, didn't you?

A. Yes, sir.

Q. Your schedule time was 8 o'clock into Bridgewater?

A. Yes.

Q. So, you run on what is called a wild-cat, no schedule up through there?

A. No schedule.

Q. You ran on any time up through there?

A. Yes.

Q. So, if you got to River Forks and was a little late and wanted to notify Caldine, or anybody coming south, you would telephone the agent at Bridgewater if you were late?

A. I did telephone for safety, but I wasn't supposed to.

Q. You telephoned the agent, and you expected as one of his duties he would go out and tell Caldine, didn't you?

A. I didn't expect he would leave up there.

Q. You told him to tell him, didn't you?

A. Yes, or I wouldn't have called him.

Q. And you did it for safety's sake?

A. Yes.

Recross-examination:

Q. I notice on Exhibit 1, near the top, "for the government and information of employees only."

A. Yes.

Q. Is that what this Exhibit 1 is regarded as?

A. It is.

Q. You ran from Bridgewater to New Berlin and New Berlin to Bridgewater, there is no regular stop for you between Bridgewater and New Berlin as indicated on this time card, I notice that, that is a fact, isn't it?

A. Yes.

Q. Now, is it a fact you stopped at every station?

A. Oh, yes.

[fol. 51] Q. Between Bridgewater and New Berlin?

A. Every station.

Q. What did you do in regard to observing whether there is a clear track ahead for you to proceed to the next

station; what did you do at each station? About observing whether or not there is a clear track ahead—anything?
A. No.

Q. These printed orders are absolute and positive ones unless countermanded by another order?

Objected to as leading, incompetent, immaterial, irrelevant.

Objection overruled. Exception.

A. Yes, sir.

Q. And the point of the switch where you go in on the turntable switch is about how far south of the station at Bridgewater?

A. Oh, 25 or 30 rods, something like that.

Q. Twenty-five or 30 rods?

A. Yes.

Q. Have you observed as to whether or not the gas car often moved down a ways on that switch to be nearer the point of the switch to proceed on its journey after the freight goes in on the turntable switch?

Objected as to incompetent, immaterial, irrelevant.

Objection overruled. Exception.

A. I couldn't say as I ever remember of their pulling down there.

[fol. 52] Raymond Dawson, witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Q. Where do you live?

A. Bridgewater.

Q. What is your occupation?

A. Station agent.

Q. Have you other duties there at the station?

A. Yes, I am operator and express agent.

Q. You are operator?

A. Yes.

Q. And station agent?

A. Yes.

Q. And on June 25, 1924, were you employed by the Unadilla Valley Railroad Company?

A. I was.

Q. As station agent and operator at that station?
A. Yes, sir.

The Court: At what station?

Q. Bridgewater?
A. Yes, sir.
Q. And were you at your post between eight and nine o'clock on the morning of June 25, 1924?
A. I was.
Q. Are you acquainted with Frank Risley, who was just sworn?
A. Yes, sir.
Q. Know his voice when you hear it?
A. Yes.
Q. Have talked with him many times over the telephone?
A. Yes.
Q. On the morning June 25, 1924, at about eight o'clock that morning, did you get a telephone call from him?
A. Yes, I did.
Q. Tell the jury what he said to you?
A. He said, "We are ready to leave the Forks," and he says, "We are coming, hold gas car," that is what he said.
Q. He phoned you then?
A. Yes.
Q. At the time you received that telephone call had the [fol. 53] gas car coming from the north yet arrived at your station?
A. No.
Q. It hadn't?
A. No.
Q. So, Caldine, who is now deceased, and Dibble, who was on the car, wasn't in the depot when you got that telephone call, were they?
A. No.
Q. Now, you tell this jury whether at any time before Caldine's car left your station, whether you told him Risley's train was coming?
A. I told the motorman.
Q. Did you tell Caldine, the conductor?
A. No, I didn't.
Q. You knew the train left there, didn't you?
A. I saw them going.

Q. So that at any time you never told Caldine, did you?

A. No, I didn't have a chance to.

Q. Just a minute. Did you see him come into the station, Caldine?

A. I was out at the head end of the car transacting exchange of mail when he rushed into the station and rushed out and pulled cord and away they went.

Q. You saw him go, didn't you?

A. Yes.

Q. Never said a word to him?

A. I couldn't.

Q. You couldn't?

A. Didn't have a chance to.

Q. He walked right by you, didn't he?

A. No.

Q. How near was he to you?

A. The length of the gas car.

Q. How far is that?

A. I imagine that car was 40 feet long.

Q. I will ask you this: Didn't you stand and chat with some boys there side of the railroad station before the passengers, before the train left that morning?

A. I don't know as I was visiting with them, there was some there.

[fol. 54] Q. Didn't you stay there and chat with them while the train stood there?

A. Not that I know of.

Q. Will you swear you didn't?

A. No, I won't swear so because I don't remember.

Q. I will ask you another question: You mean to tell this jury you even spoke with the motorman on that car?

A. Yes, I do.

Q. What is his name?

A. Dibble.

Q. But you do tell them you never told the conductor?

A. No, I didn't tell the conductor.

Q. Or said a word to him?

A. No.

Q. And still he walked right straight into the station where you were station agent, and operator?

A. I wasn't in there.

Q. You knew he had to come in there?

A. The register book is outside the window.
Q. He did go in the station, didn't he?
A. Yes.
Q. He went right out and you saw him pulling the cord?
A. Yes.
Q. How far were you from him when he pulled the cord?
A. Length of the gas car.
Q. About 25 feet?
A. If that is the length of it.
Q. You never said a word?
A. No.

Cross-examination by Mr. Sullivan:

Q. Are you now and were you at the time of the accident a joint station agent in the Lackawanna and Unadilla at Bridgewater?
A. I was.
Q. Employed by both companies?
A. Yes.
Q. You had duties to discharge for both companies?
A. I had.
[fol. 55] Q. Are you familiar with the rules under which the Unadilla Valley Railroad Company was operating at the time of the accident?
A. I was.
Q. Are you familiar with the rule printed positively upon Exhibit 1?
A. I am.
Q. Relative of the meeting of this train at that time?
A. Yes.
Q. At Bridgewater?
A. Yes, sir.
Q. Will you read it to the jury?

Objected to, paper is best evidence, and he asked about half a dozen times.

Mr. Sullivan: We want what it is.
The Court: I will let him read it.

A. "Train No. 15 will take turntable siding at Bridgewater to allow Train No. 2 to pass. This is positive meeting and cannot be changed."

Q. It is absolute, positive meeting?
A. Yes, absolutely.

Mr. Lee: I object to the last statement. He didn't read from the paper, Exhibit 1.
The Court: Strike it out.

Q. Now, you are not reading: whether or not that is a positive order that cannot be changed?
A. That is positive order.

Objected to as incompetent, immaterial, irrelevant, inadmissible.
Objection overruled. Exception.
The Court: Positive order that cannot be changed?
Mr. Sullivan: Yes.
Objected to and exception.

[fol. 56] Q. That is, it cannot be changed without another positive order?
A. No, that is it.
Q. You had been at that station since April 25, 1924?
A. Yes.
Q. Had Mr. Caldine been conductor operating this gas car, No. 2, up and down, past your station for two months prior thereto?
A. He had.
Q. And had under this same time card and this same schedule?
A. Yes.
Q. Met No. 15 there every day?
A. Yes.
Q. Now, Mr. Clark didn't understand just how many exceptions, how many times to give the jury a notion of the idea, if you recall about how many timse would there be a positive order countermanding and changing this printed order?
A. I remember at least two times.
Q. Is that the only times you remember of it occurring in the two months prior to this accident?
A. Yes, I think there was more, but I only have proof of two times.
Q. How long did this Train No. 2 stay and remain at Bridgewater station?

A. Not over half a minute.

Q. Not over half a minute?

A. After they got over on their own side of the station they weren't there over half a minute.

Q. They have to take a switch and come off the Lackawanna tracks?

A. Yes.

Q. North of the depot and take a switch and come south of the depot?

A. Yes, they back off the Delaware tracks over the crossover and down on the Unadilla tracks.

Q. This gas car stops quickly?

A. Yes.

Q. And picks up quicker than an ordinary train?

A. Yes.

[fol. 57] Q. They step on it and it picks up and goes on?

A. It does.

Q. Are you familiar with this car, I show you photograph, just to give the jury an idea what it is, is that a correct picture of the car?

A. That is the car, yes.

Picture marked Exhibit 3, offered and received in evidence.

Q. Is that a correct representation?

A. Yes, I think there was a little bit more baggage room to that than there is to this one.

Q. But it is substantially the same?

A. Yes, sir.

Q. How long have you been employed by the Lackawanna there?

A. In Bridgewater alone?

Q. Anywhere on the railroad?

A. Ten years all told.

Q. You are familiar with the duties, rules and customs prevailing in the running of railroads, and duties of conductors?

A. I am.

Q. And operations of trains?

A. Yes, sir.

Q. Who has charge of the movement of a train, passenger trains?

A. The train dispatcher.

Q. Telling them when to leave on the Lackawanna?

A. Yes.

Q. Now, when a train is at the depot the execution of the orders for the movement of the trains, who does that belong to, whose duty is that?

A. The conductor.

Q. Has he charge of the train entirely?

A. Yes.

Q. And the engineer has no right to move at all until he gives a signal?

A. None whatever.

[fol. 58] Q. Now, at this point in the yard at Bridgewater, I show you Exhibit 2, this is Unadilla map; there is Delaware road and depot and here is Unadilla Valley?

A. Yes.

Q. About how far is it from the depot to the point of the switch?

A. From the depot to the turntable switch?

Q. The point where the freight train would go on the switch?

A. I should say 150 feet, it might be 200, I don't know.

Q. This map is drawn 200 feet to the inch?

A. Well, that would be around 400 feet, then.

Q. When the Train 2 came into the station and met No. 15 in the Bridgewater yard have you observed as to whether or not often when they made these meets at this yard, as to whether or not the car would pull down from the depot towards the point of the switch 300 or 400 feet below?

A. It was seldom ever that they had to wait for the freight train. The freight train was most always there.

Q. And on the switch?

A. Yes.

Q. So, there wasn't any reason for the gas car to pull down and wait for them; but it is absolutely safe to pull down there to the point of the switch?

A. Yes, we have passing siding on the Lackawanna that is good and long and it is a matter of minutes to pull down there, and the passenger train would pull down there and wait for the freight train to come on the siding.

Q. Is that what you thought they were doing that morning?

Objected to. Objection sustained.

[fol. 59] Q. What did you understand they were doing that morning when they moved down as you saw them?

Objected to as incompetent, immaterial, irrelevant.

A. That is what I thought they were doing, going to wait there.

Q. Have you observed anything as to the custom, as to Mr. Caldine, after he gets on the car going out on the back platform?

A. No, he never did.

Q. You never noticed that?

A. No.

Q. But it is very plainly visible, the track, the main track from a train standing on this turntable switch, there is no obstruction between the switch and main track?

A. No, there is not.

Q. So that a man looking from the window or platform from Train 2 could easily see whether a freight train was in on the switch?

A. Yes.

Q. You say he gave a signal for to start?

A. Yes.

Q. What is that signal?

A. Two bells.

Q. There is a bell rung by a cord?

A. Yes.

Q. The motorman was in the front of the car where the baggage compartment was?

A. Yes, sir.

Q. And the conductor boarded the train at the rear?

A. Yes, sir.

Q. And pulled the cord from the rear?

A. Yes.

Q. Two bells?

A. Yes.

Q. The specifications call this car 60 feet long, did I understand you or was I mistaken you said 30 or 35 feet?

A. I said about that; I don't know just how long it was.

[fol. 60] Q. It was the full length of the car?

A. Yes.

Q. They stayed there about half a minute?
A. Yes.

Objected to, repetition.
Overruled.

Q. About half a minute?
A. Yes.
Q. And Caldine rushed into the station?
A. Yes.
Q. And rushed right out to the rear end of the train?
A. Yes.
Q. And in the meantime, at the same time, you were at the baggage car busy transacting business with Dibble, the motorman?
A. Yes.
Q. What did you say to Dibble, the motorman?
A. I says, "They will be here in a minute."
Q. Dibble was the one that operated the engine on the car or motor that made the car move?
A. Yes.
Q. Is that so?
A. Yes, sir.

Redirect examination:

Q. You heard the gas car coming, did you?
A. Coming in from the Junction?
Q. Yes.
A. Yes.
Q. And you were inside of the station and station is east of the track, isn't it?
A. East of the U. D. tracks.
Q. How far is it between the station door and railroad car track?
A. About eight feet.
Q. So, when the car stopped Caldine came right into the station?
A. Yes.
Q. And you went right out of the door, out to the car?
A. Yes.
[fol. 61] Q. And you went right by him?
A. No, sir.
Q. How near were you to him?

A. I was out there before the car came in.

Q. So, when he got off the car and came in the door he came right by where you were?

A. No, I was down to the head of the car, the car door, the motor car door, passenger door stops about opposite the waiting room door.

Q. You told counsel on the other side for the railroad company that the dispatcher is the one that controls the operations of trains?

A. They are.

Q. And you say the ones to execute the orders from the dispatchers are the conductors on the train?

A. Yes, sir.

Q. And you never gave any notice to Caldine, the conductor?

A. I didn't get any orders for the train.

Q. I asked you if you gave any to Caldine, the conductor?

A. Any verbal instructions?

Q. Yes.

A. No.

Q. None?

A. No.

Q. But now you claim you did to Dibble?

A. Yes, sir.

Q. You tell the jury again you were up ahead when the car was in there all the time?

A. Yes.

Q. Your voice is good, isn't it?

A. Yes.

Q. And clear?

A. Yes.

Q. And it was all right that morning?

A. I think it was, as I remember.

Recross-examination:

Q. Counsel asked you if on any other occasion the train was late and met at any other point than Bridgewater; [fol. 62] you say you only remember two occasions?

A. Two occasions is all.

Q. And the other meets, was that made by an oral order or by an order from the general manager of the Unadilla Valley?

A. The two I remember?

Q. Yes.

A. They were made from a printed order from the superintendent's office.

Q. I show you two papers, Exhibit 4?

Mr. Lee: Objected to, I didn't go into this.

Objection overruled. Exception.

Q. I ask you if those papers marked Exhibit 4 are train orders that must be given before Train 2 can meet 15 at any other point?

Objected to, leading and suggestive.

Objection overruled. Exception.

A. They are.

The Court: Those are the two that were given?

Mr. Sullivan: Yes.

Q. Are those the only two occasions you remember since this car had been put on that No. 2 hed meet 15 at any other point than Bridgewater yard?

A. Yes.

Q. Those are the only two occasions?

A. Those are the only two I remember of.

Q. When the freight train is on time and in on the switch there is no phoning and no advice to you?

A. No.

Q. But when it is a few minutes late they call you?

A. It has been customary for them to.

[fol. 63] Q. To see whether there is any other orders to meet anywhere else?

Objected to as leading and suggestive.

Objection sustained. Exception.

Q. For what purpose do they phone you when they are late?

A. As near as I can say just to give the motor car an idea about how long they have got to wait for them.

Q. That is it?

A. Yes, when the motor car pulls in, if the freight train isn't there they naturally want to know how long they have got to wait.

Q. These orders are in writing and handed to the conductor?

A. Yes.

Q. When they meet at any other place?

A. Yes.

Q. But you had none that morning?

A. No.

Q. You told the motorman about the freight train being on the way?

A. Yes.

Q. And Caldine got on the end and pulled the cord?

A. Yes.

Q. Did you see him pull the cord?

A. I did.

Q. The car picked up quick and moved down the track?

A. Yes.

Q. You didn't know how far they were going, did you?

A. No.

Q. Are those orders that have been in force on the Unadilla Valley in the operation of its trains since you have been there, all the time you have been there?

A. No.

Q. All the time this car has been in operation?

A. Yes, when they put car into operation they put into effect these printed orders.

Q. As a matter of fact, the Unadilla Valley Railroad Company main line is only 19.13 miles long, exclusive of sid-
[fol. 64] ings?

A. Something like that, yes.

Q. Less than 20 miles?

A. Yes.

Q. And it is not under the control of the Lackawanna or any other railroad, as far as you know?

A. Not that I know of.

Exhibit 4 offered and received in evidence.

Redirect examination:

Q. Who is H. A. B.?

A. Mr. Brohn.

Q. Have you checked up these, or where did these come from?

A. From right up the line.

Q. You checked your files pretty close?

A. I hunted through and found those two.

Q. Those are the only ones you could find?

A. Yes.

Q. Do you mean to say you didn't tell this morning you thought they passed that place more than two times?

A. It seems to me they did, but those are the only times I can remember.

Q. They have gone down through there more than twice, and gone through your place to River Forks and met at other places?

A. These two are the only two I have a record of.

Q. And other times they passed your place and you haven't any record of them?

A. I couldn't find them.

Q. Isn't it a fact that a number of times this man Risley phoned to you as station agent and operator there that he was coming and to hold the gas car?

A. Yes.

[fol. 65] Q. Hadn't he done that before that time?

A. Yes, several times.

Q. And it had been a custom of yours to go out and tell them they were coming?

A. Yes.

Q. And that is the custom while the train was on there?

A. Yes.

Q. And you told Caldine, didn't you?

A. Yes, sir.

Q. But this morning, you didn't tell him?

A. No.

Recross-examination:

Q. Counsel asked you if it was your custom to go and tell 'em the car was coming? What do you mean by 'em?

A. The motor crew.

Q. Sometimes the motorman and sometimes the conductor?

A. Yes.

Redirect examination:

Q. Isn't it a rule when you give orders to give it to both?

A. I had no orders.

Q. Didn't you tell the jury a few minutes ago you usually told Caldine?

A. Yes, that isn't an order.

Q. It is what you call it, but at least you told him?

A. Yes.

Q. Do you want to still tell this jury you did not sit that same morning on a bench when the train went by?

A. Not that I know of.

Q. Will you swear you didn't; we have some passengers that were looking at you, do you want to swear to that?

[fol. 66] Objected to, suggestive.

Overruled. Exception.

Q. Were you sitting there just quietly and the train went by?

A. I won't say whether I was sitting or standing up, it is a year ago. I was up by the motorman at the front end when the train was in there.

Q. Did you sleep on the front end?

A. No, they weren't there long enough to sleep.

Recross-examination:

Q. Will you swear that No. 2 ever went down and met 15 at any other point without an order?

A. No, sir, they never did.

Q. And those are the only two orders you can find in your records?

A. Those are the only two I could find.

Q. And an order is communicated to Caldine, the conductor, if there is an order?

A. Yes.

Redirect examination:

Q. That is what you say?

A. Yes.

Q. You don't know whether that is correct?

A. What is?

Q. What you said is correct?

A. If we have an order the conductor and motorman both get it.

Q. So when you notify them of anything you notify both of them?

A. When they have an order it is in writing, it is not verbal.

Recross-examination:

Q. This telephone conversation between you and Risley was not an order?

A. No.

[fol. 67] Objected to as leading and suggestive, it is for the jury to say.

The Court: Sustained.

Q. Under the customs and rules of railroads do you regard it as an order, anything unless it comes from an official or train dispatcher?

A. It has to come from an official train dispatcher and it has to be in writing. No verbal conversation goes at all.

Q. This conversation between you and Risley this morning was just for information?

A. Yes, a piece of information, it is no order.

Q. The usual thing—was it done to vary this rule here?

A. No.

Redirect examination:

Q. You made a pretty good search of your records?

A. I won't say so. I filed these right in some Delaware train orders, and I have quite a stack of them. Two is all I could find.

Q. Two is all you could find?

A. Yes.

Arthur Dibble, witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Q. You live where?

A. Norwich.

Q. In June, 1924, 24th, what was your occupation?

A. Motorman.

Q. For what railroad company?
A. Unadilla Valley.
[fol. 68] Q. The defendant in this action?
A. Yes, sir.
Q. Do you remember of the morning of June 25, 1924?
A. I have quite a lot of cause to.
Q. You do remember it?
A. I do.
Q. What train were you employed on at that time?
A. No. 2.
Q. That is the gas train?
A. Yes, sir.
Q. What was your occupation on that car?
A. Well I was mail man and motorman both.
Q. Where you the fellow that was the motorman on the car?
A. I was.
Q. Do you remember of the train getting that morning into Bridgewater?
A. I do.

Mr. Sullivan: If the Court please, this man isn't in our employ and he has an action pending between him and against this company for a couple hundred thousand dollars in Syracuse——

Mr. Lee: Is this a stump speech or an objection? I object to it.

Mr. Sullivan: I insist that he conform to the usual rules of not leading with this witness.

Mr. Lee: I object to his interrupting me.

Q. Were you the motorman on there?
A. I was.
Q. And I got you pretty near into Bridgewater?
A. Yes.
Q. Do you remember getting up to Bridgewater?
A. Yes.
Q. And stopping there?
A. Yes.
Q. Do you know this fellow that was on the stand just now, Mr. Dawson?
A. I do.

[fol. 69] Q. Tell the jury whether or not at any time that morning that man told you that the freight train was coming?

A. No, not that I remember a thing.

Q. Do you know where he was that morning?

A. I don't know as I even seen him.

Q. That morning?

A. No.

Q. Did you have the mail to attend to that morning there?

A. I did.

Q. Did you attend to it?

A. Yes, sir.

Q. What did Caldine do?

A. He went and helped passengers on and off and went in and registered on the book and came back out and was ready to go and we went.

Q. What pay did he get?

A. $5 a day.

Q. He had been a conductor there how long?

A. All the time I was there, I can't tell how long before that.

Q. Was he a young man of good health?

A. Yes, sir.

Q. Sober and industrious?

A. Yes, sir.

Q. And was that morning?

A. Yes, sir.

Q. Was he active and taking care of his duties?

Objected to as incompetent, immaterial, irrelevant.

A. I have heard Mr. Brohn say he was very efficient.

Q. Have you done some railroading in your life?

A. A little bit.

Q. You worked on the Intercolonial a little yourself?

A. Yes, sir.

Q. What else?

A. D. & H., and Unadilla Valley about 10 years.

[fol. 70] Q. You had been running this passenger train how long?

A. Oh, ever since the car started. I can't remember the date the car started, I think it was 27th day of April it started over to the Junction.

Q. I notice by the time table, Exhibit 1, your leaving time out of Bridgewater was 8:10?

A. It was.

Q. Was that about the time you left that morning?

A. I think we were about two or three minutes late.

Q. You had been on this train ever since it started?

A. Yes.

Q. And you knew of the freight train?

A. Yes.

Q. Under the rules and customs which had the right of way?

A. I understand ours had by the book of rules we were handed.

Q. That is the passenger?

A. The passenger.

Q. You were motorman handling your train, it was your understandings of the rules and regulations of the road, it was your understanding that your passenger train had the right of way?

A. Yes, sir.

Cross-examination by Mr. Sullivan:

Q. How long prior to this accident had you been employed by the Unadilla Valley Company?

A. I think from around about the 4th of March before that, this time.

Q. Had you previously worked for them before?

A. I had.

Q. How long ago?

A. I can't just remember how long before that. It was [fol. 71] about ten years, altogether.

Q. You worked there 10 years?

A. I should imagine that.

Q. As engineer?

A. No, foreman and everything.

Q. You were running this Train No. 2 at the time of the accident?

A. Yes, sir.

Q. And you were sworn before the coroner on the inquest, were you?

A. I was.

Q. On or about, or soon after the accident, while you were in the hospital?

A. Yes, very soon after the accident.

Q. Did you at that time state; did the coroner ask you this question: "Did Mr. Dawson tell you the freight was coming from River Forks? A. If he did I don't remember it"?

A. I think I did.

Q. (Reading.) "What orders did you have to go ahead and leave Bridgewater?

A. Two bells, the conductor's signal."

A. Absolutely.

Q. You worked for ten years on the road, you say?

A. Yes.

Q. Under the rules of this road, and all roads, as far as your experience goes, who has charge of the movement of the train?

A. The conductor.

Q. And the train cannot move, you have no right to start until the conductor gives signal?

A. That depends, you have no right to leave the station until the conductor signals; but in switching any one of the trainmen can give it.

Q. You can go down the track a little?

A. Yes.

Q. Upon the movement of a passenger train, or any other regular train from one station to another your train cannot [fol. 72] start until the conductor gives a signal?

A. No, it cannot.

Q. I assume in the meeting of this freight train on former occasions in the Bridgewater yard, where both were on time, you would drift down towards the point of the switch to save time and distance and wait for the freight to come?

A. No.

Q. Never did that?

A. Not that I remember, no.

Q. I show you Exhibit 1, and ask you what that is?

A. That is time-table.

Q. Is that the time-table under which the defendant was operating at the time of the accident?

A. It is.

Q. And this printing matter at the bottom of the page, was that on there?

A. It was.

Q. Did you have one of them in your possession?

A. I did.

Q. Mr. Caldine have one in his possession?

A. I think he did.

Q. You have seen him with it?

A. I have seen him looking at them, yes. He had a paper about this length with stuff written on, I don't know whether he did or not; yes, he did, too. He must have had.

Q. You knew he had?

A. Yes, I think he did.

Q. These orders printed on here are positive ones unless they are changed by some other order?

A. Yes.

Q. And that order is in writing?

A. Yes, ordinarily.

Q. It always is, isn't it?

A. It should be, yes.

Q. And unless you have a written order countermand-
[fol. 73] ing and changing or superseding these orders, this order of "Train 15 take turntable sitting at Bridgewater to allow No. 2 to pass and Train No. 2 will pass Train 15 in the Bridgewater yard" was positive?

A. Train No. 2 will pass Train 15 in the Bridgewater yard is positive. The rest of it don't amount to so much.

Q. Train No. 2 will pass Train 15 in the Bridgewater yard was absolutely positive and you knew it and Caldine knew it, didn't he?

A. Why, yes.

Q. You stated in response to the coroner: "Has it been customary for conductor to get clearance cards for both, to do that"—you always do that, this is a written order?

A. You mean get a clearance card for the meeting of that train?

Q. Yes?

A. No, sir.

Q. Just clearance orders except for three, what do you mean by that?

A. I don't understand what you mean?

Q. No. 3?

A. Train 3 is going north; north bound train it is No. 3.

Q. Did you in this examination before the coroner, were you asked this question: "When you left Bridgewater on the morning June 25th you went ahead on orders from the conductor, two bells to go ahead"; did you say yes?

A. I did.

Q. Did the coroner ask you this question: "When did you expect to pass the freight train," and did you answer: "I can't remember whether I thought about it or not. I have tried to remember since whether I thought about it or not"; did you make that answer?

A. I might have said that, yes.

[fol. 74] Q. The coroner asked you this question: "You say you didn't think about the freight train at all? A. Not that I can remember?

A. I imagine I said that.

Q. Was it true then?

A. Now, listen——

Q. I am not going to listen only to your answer; was that true then?

A. It was then, yes.

Q. And is it not?

A. I am not allowed to make any explanation of that at all.

Q. Is it true now?

A. Well, yes.

Q. Did the coroner ask you this question: "Have you ever left Bridgewater station before this accident occurred on that run when the freight train was not in the switch or within sight or you had written orders to pass it at River Forks?" and did you say, "No, sir"?

A. I think I did.

Q. Was it true then?

A. I think it was then.

Q. And is it true now?

A. As far as I know, yes.

Q. This baggage car, some one talked about Caldine being in among the debris, what was it loaded with at the time the accident occurred?

A. Mail and some 16 or 18 cans of fish, something like that, and one big can of ice.

Q. Those were ordinary milk cans?

A. About the size of milk cans.

Q. You spoke of fish?

A. Yes.

Q. Were they fingerlings?

A. True, small fish, yes.

Q. That were being distributed to various streams by the State Conservation Department?

A. It was, yes.

Q. And they were in charge of Mr. Martin Hanrahan and [fol. 75] Mr. Caldine and he were in the baggage compartment with you at the time?

A. Mr. Caldine wasn't in there as near as I can find out. I can't remember any one was in there, but I do remember Mr. Hanrahan saying, "My God, we are going to be killed," or something like that.

Q. He was killed in the same accident?

A. Yes, sir.

Q. Those in the passenger cars were only slightly injured?

A. I think Miss Jenkins was hurt, I don't know the extent of her injuries.

Redirect examination:

Q. Did you ever wait at the switch there?

A. Not that I remember, no.

Q. Below Bridgewater, you never stopped there as far as you can remember?

A. No, I don't think we had, no.

Q. What was your condition at the time the coroner asked you these questions and examined you?

A. I wasn't in very good condition.

Objected to calling for a conclusion and asked him to describe it as near as he can.

Objection overruled. Exception.

Q. Were you in the hospital?

A. Yes.

Q. It was just a short time after the occurrence?

A. I imagine four or five days. Something like that. I just don't remember.

Q. Did you receive a serious injury to the head?

A. I had a depressed fracture; that wasn't found until I was in the hospital.

Q. You were in a hospital quite a while?
A. Six weeks.
[fol. 76] Q. And it was quite bad condition?
A. Yes.
Q. Was that the time the coroner talked with you?
A. Yes.
Q. Did Caldine work every day?
A. Yes.
Q. Seven days a week?
A. Yes, sir.

Recross-examination:

Q. This train ran Sundays?
A. It did.
Q. Are you now the plaintiff in an action against this defendant to recover damages for your injuries?
A. I am.
Q. Pending in the United States Court?
A. Yes.
Q. And that action is now pending and undetermined?
A. Yes, sir.
Q. Do you remember how much damages you claim?
A. $50,000, I think.

Redirect examination:

Q. Do you remember how far your train was pushed back?
A. I understand 200 feet.

Objected to and moved to strike out.
The Court: Strike it out.

Q. Do you know where you got hit, about where?
A. It was in Scott's cut, but I don't remember just exactly the place.
Q. Is there a curve right where it happened?
A. Yes, a curve.
Q. So that you or Caldine or any others wouldn't see this freight train until it almost met?
A. Yes.
[fol. 77] Q. That was a reason?
A. Yes.

Q. It was in this cut?

A. That was it.

Q. Off on the east side of the track at this place, the freight train would be coming north was the cut on their right?

A. Yes.

Q. And on your left as you went south?

A. Yes.

Q. Was the contour of the land at that place such that the land, where the cut was, came up pretty close to the track?

A. Yes, I think it was.

Q. An embankment there like?

A. Yes.

Q. So that it came right up to the track and went right around this embankment?

A. Yes.

Q. And you couldn't see across the cut?

A. No, you couldn't see from one end of the cut to the other.

Recross-examination:

Q. The sides of it and nose was pretty close to the track?

A. Yes, sir.

Q. You had been running on this train since the 27th of April?

A. Yes.

Q. And for ten years had run up and down that run?

A. I had been up and down but I didn't run up and down there.

Q. You knew the conditions at the Scott cut?

A. Yes.

Q. And all the conditions there?

A. Yes.

Q. Your best recollection was Mr. Caldine had run up and down there about three years?

A. He came on there before I left before, and he was on there when I came back; how long he was there I don't know.

[fol. 78] Rebecca Elting, witness on behalf of the plaintiff, being duly sworn, testified:

Q. Where do you live?

A. Utica.

Q. Oneida County?

A. Yes.

Q. What is your occupation?

A. Teacher.

Q. On the morning of June 25th, 1924, were you and your father going some place that day?

A. Yes, we were going to New Berlin.

Q. Tell the jury what was the way you were going to New Berlin?

A. We left Utica from New Hartford Station of the D., L. & W., and wanted to take the D., L. & W., Richfield Junction and I understood we changed on this little gas car. It was ths first time I had ridden on the gas car. And from there we ran to Bridgewater and then to New Berlin, supposedly.

Q. You intended to go to Richfield Junction on the gas car and New Berlin?

A. Yes.

Q. To visit your brother?

A. Yes.

Q. On this morning in question do you remember getting in on this station at Bridgewater?

A. Yes.

Q. Do you remember seeing this young man Dawson, who is the station agent?

A. Shortly after we left the station, I don't remember seeing him before.

Q. Where did you see him, where was he then?

A. He was seated with two or three men outside of the station door on a bench, and I noticed him because he had white shirt sleeves and the other men were in blue jeans.

Q. What was he looking at?

A. I don't know.

Q. What was he doing?

[fol. 19] A. He just sat there; made no visible effort to prevent our leaving, apparently——

Objected to and moved to strike out as a conclusion and improper.

The Court: Strike it out. He sat there and did not do anything; did you see him doing anything as train was leaving?

The Witness: No.

Q. Was the conductor on then, Mr. Caldine?

A. Yes.

Q. Do you remember after you left the station of seeing Mr. Caldine?

A. Yes, on the car, he came up to take tickets.

Q. Do you remember whether the man looked that morning as healthy and alert?

Objected to as incompetent, immaterial, irrelevant, witness not shown competent.

Objection overruled. Exception.

(No answer.)

Q. Do you remember whether he carried on conversation with you folks?

A. Yes, he took our mileage and my father asked him if he had enough to get back on, but he didn't have time to answer before the accident occurred. Before that we had asked him what time the train was due in New Berlin and he told us 9:10, and I looked at watch, which was on daylight saving time, and he said it is 10:10 your time, I thought that showed an alert mind——

Objected to last part.

The Court: Strike it out.

[fol. 80] Q. After you left the station what happened in a very short time?

A. The accident happened, we got bumped so badly, just as he was taking the mileage my father had and my father hadn't time to look at the mileage that he had to see if he had sufficient mileage to come back on.

Q. Where was Mr. Caldine?

A. Directly opposite my father.

Q. In the baggage part?

A. In the aisle on the passenger section.

Q. There apparently was a partition between the front and back of the car?

A. Yes, partition with wooden door.

Q. Was the door open or closed?

A. It was closed at the time traveling but broken at the time of the accident, broken all within about half a foot of the floor.

Q. At the time you heard the crash where was Mr. Caldine standing?

A. Just beside my father.

Q. He had just took your mileage?

A. Yes.

Q. They were discussing the question whether he had enough to come back or not?

A. Yes.

Q. When the collision occurred?

A. Yes.

Q. At any time while you were at the station did you observe Dawson talking with the motorman or conductor?

A. No, sir.

Q. Did you see Mr. Dawson afterwards?

A. After the accident?

Q. Yes.

A. Yes, we came back to the station, he was the first person I saw and recognized, and I said to him then, "Why didn't you prevent that car going out if you knew the freight was coming in?" It was a general impression I got from the workmen——

[fol. 18] Objected and moved to strike it out as incompetent, immaterial, irrelevant.

The Court: Strike out it was general impression.

Q. What did he say to you?

A. He said nothing. He did not answer me. He was very much perturbed.

Cross-examination:

Q. You live where in Utica?

A. On Holland Avenue.

Q. Can you give me — number?

A. 2004.

Q. Have you talked with Mr. Lee about what you should testify to here?

A. Have I talked in Mr. Lee's office?

Q. Yes.

A. Just a minute before I came over.

Q. You seem so awfully anxious to interlope some statement that was your conclusion I didn't know but you had some training with him or talk with him, have you?

Mr. Lee: We don't train our witnesses that way.

A. No, sir, I had no training. I told you just exactly what happened.

Q. You were a passenger?

A. Yes.

Q. Your father was riding with you?

A. Yes.

Q. Mr. Caldine gave the signal for the car to start?

A. I suppose he did, I don't know.

Q. Were you looking out of the window all the while?

A. Not all the while. I happened to look out of the window as we left the station.

Q. Are you willing to swear Mr. Dawson did not go to [fol. 82] the baggage car with the mail and other matters connected with the railroad business and operation of that train and talk with Mr. Dibble?

A. No, I don't know what Mr. Dawson did.

Q. When you left you say he was seated on a bench?

A. Yes, sir.

Q. Are you sure?

A. Positive.

Q. Absolutely?

A. Absolutely positive.

Q. And that he was looking towards the car?

A. Yes, with his face.

Q. You went down the road quite a little ways to the point of the switch before you met this freight didn't you?

A. Yes, it was in that cut.

Q. Down about 400 feet south of the station?

A. I don't know what the distance was. We came back on a very different conveyance.

Q. You never saw Mr. Dawson prior to that day?

A. No, not to my knowledge.

Q. You never saw him since until today?

A. Not to my knowledge.

Redirect examination:

Q. There was something that day that happened that sort of impressed things on your mind?

Objected to as leading, calling for a conclusion, incompetent, immaterial, irrelevant.

Objection overruled. Exception.

Q. There was some things that impressed your recollection about it?

A. Yes, indeed.

[fol. 83] Ernest Caldine, witness on his own behalf, being duly sworn, testified:

Q. Your full name is what?

A. Ernest Caldine.

Q. What is your age?

A. 59 past.

Q. For some time prior to June 25, 1924, where did your son, Harold, in his lifetime live?

A. With me.

Q. How long had he lived with you?

A. All the while.

Q. All his life?

A. All his life.

Q. Where were you and Harold living?

A. On West Hill.

Q. In New Berlin?

A. Yes.

Q. You had lived there how long?

A. We had lived there pretty close to two years at the time of his death.

Q. Prior to the death of Harold how long was it you had worked steadily in a place?

A. It had been over a year.

Q. What was the reason of your stopping working?

A. Well, I fell down and hurt my back and I couldn't do nothing after that.

Q. You couldn't lift things and like that?

A. Nothing at all, of course, I can walk very good when I get started but when I sit for a little while it bothers me to get up.

Objected to as immaterial, and moved to strike it out, and incompetent.

Objection overruled. Exception.

Q. Preceding the death of your son, Harold, had he paid you any money each month?

[fol. 84] Objected to, incompetent, immaterial, irrelevant, calling for personal transaction and communication between the witness and deceased person, his intestate, and incompetent under the section that supersedes 829 of the Code.

Overruled. Exception.

Q. Did he pay you some money each month to help care for you?

A. He paid me $20 a month for over a year, for my clothes, board and upkeep.

Q. Done that for over a year?

A. Yes.

Q. In addition to that did he bring anything into the household where you lived?

Objected to, leading.

Overruled. Exception.

Q. Did he bring anything else into the household where you lived?

A. Yes.

Q. Provisions and all that?

A. Yes.

Q. That is, did he help with the household expenses in addition to the $20 a month he gave you?

A. Yes, sir.

Q. Did you and he live there alone?

A. All alone, yes.

Q. May I ask the condition of your son's health?

A. Good.

Q. Was he a rugged boy?

A. He never was sick a day in his life — I know of.

Q. How old was he?

A. 27 years old.

Q. Worked steadily?

A. Every day.

Q. Boy of good habits?

A. Yes, sir.

[fol. 85] Cross-examination:

Q. All he paid you was $20 a month?
A. Yes.
Q. That is for the past year?
A. For a little over a year.
Q. About a year and two months?
A. Somewheres around that.
Q. $20 a month?
A. Yes.
Q. He boarded at your house?
A. Yes.
Q. And had his home there?
A. He made it his home there, yes.
Q. He had his meals there and room there?
A. Yes, roomed there and had his meals there.
Q. Were you the head of the household there; were you the head of the household?
A. Yes.
Q. Of whom did your family consist at that time?
A. Myself now.
Q. At that time?
A. Myself and him was all.
Q. What lady was in the household?
A. None, only in the other part.
Q. You got the meals yourself?
A. Yes, we done cooking.
Q. And did washing dishes and usual housework usually done by a woman?
A. We done all of it, yes.
Q. Is your wife dead?
A. No. I haven't seen her in a long time.
Q. She left you some time ago?
A. Some eight years ago she disappeared.
Q. You haven't seen her since?
A. No.
Q. What work have you done?
A. Yes.
Q. In the past five years have you worked any?
A. Yes. I worked on the Unadilla Valley less than five years.
[fol. 86] Q. You haven't worked any since you discovered that your boy Harold was willing to support you?

A. Now, you got that wrong.

Q. Have you; you haven't worked any in the last year and two months?

A. No, for I am not able to work.

Q. Where did you fall?

A. My back.

Q. Where did you fall, the location?

A. On the sidewalk.

Q. In New Berlin?

A. Yes.

Q. Did you sue the village?

A. I did not.

Q. How long ago did you fall?

A. Well, it is pretty close to, I should say two years or better,

Q. Who is the doctor?

A. I haven't got any.

Q. Didn't have any?

A. No.

Q. Immediately after the fall did you go to a hospital or to bed?

A. No, I didn't notice so much for a few days at first. Then it began to come on me.

Q. Before you noticed it where were you working?

A. On the Unadilla Valley.

Q. What doing?

A. Section foreman.

Q. How long did you keep that position?

A. I think I was there something like two years.

Q. As section foreman?

A. I don't know just exactly how long but something around two years.

Q. Done any work except housework in the last year and two months?

A. Nothing only just a few minutes at once, something I can stand up and do.

Q. Just a few minutes at a time?

A. Nothing but a few minutes to once, just odds and ends.

Q. You get your recreation and rest from sitting at Charley Bank's hotel, in the billiard parlors up there?

[fol. 87] A. You don't find me to Charley Bank's.

Q. But this other fellow that runs the billiard parlor, you sit there?

A. Is that so?

A. Don't you?

A. I guess not.

Q. You stay right around your fireside—that is all.

Redirect examination:

Q. At least you haven't been able to work since the boy has been gone?

A. No, I can't work now.

Recess until 2 P. M.

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2 P. M., case resumed.

Hezekiah Elting, witness called and sworn on behalf of plaintiff being duly sworn, testified:

Q. You live where?

A. Utica.

Q. Are you the father of the young lady who was sworn here this morning?

A. Yes.

Q. On the 25th of June, 1924, did you start with your daugther down to New Berlin?

A. Yes.

Q. Did you take the gas car, so-called, from Richfield Junction down to Bridgewater?

A. Yes.

Q. Do you remember seeing the conductor?

A. I do.

[fol. 88] Q. Mr. Caldine?

A. Yes.

Q. Do you remember after you had left the Bridgewater station, as soon as you left Bridgewater station what did you notice him doing?

A. Taking up the tickets.

Q. Do you remember the time of the crash?

A. Yes.

Q. The collision?

A. Yes.

Q. Where was Mr. Caldine then?

A. He was at my elbow in the aisle, just taking my mileage.

Q. Where were you sitting in the passenger coach?

A. The first seat from the back and on the inside next to the aisle, left-hand side of the car.

Q. At the time of the crash he was there?

A. Yes.

Q. Did you see him after the crash?

A. No, I didn't see him after the crash. The crash came so quick there couldn't anybody see anything after that.

Q. Did you notice before the crash whether the door was open or shut between the baggage car ahead and passenger coach?

A. It was closed.

Q. Did you notice after it was over with after the collision?

A. It was open, had the appearance as though the panel was pushed out.

Q. You mean the door was broken through?

A. Yes.

Q. Did you see Mr. Caldine after the collision?

A. No, sir, I did not.

Q. What side of the car did you sit on at Bridgewater station?

A. On the left-hand side of the car, next to the station.

Q. That is going south?

A. Yes.

[fol. 89] Q. Did you see the station agent, Dawson, there?

A. Yes, I saw him.

Q. Where did you see him?

A. He was outside the station there with two or three men.

Q. Where was he when you saw him?

A. He was sitting on a seat right alongside of the door.

Q. When was that, before the car left?

A. While the car stood there and just as it was leaving.

Q. So he was sitting there before the car started and as it was leaving?

A. Yes.

Q. Did you see Mr. Dawson at any time talking with Mr. Dibble, the motorman?

A. No, not as I would recognize because I didn't know who dibble was, I didn't know who the motorman was. He may have talked with him, but I didn't notice him.

Q. Did you see him at any time talking with the conductor?

A. No, sir.

Q. Did you notice where the conductor came from or went to while he was at Bridgewater?

A. He went in the depot and was there a minute, or very few minutes, maybe around a minute and came out again and got on the car.

Cross-examination by Mr. Sullivan:

Q. Were you sworn before the coroner on the inquest in this case?

A. Yes, sir.

Q. That was soon after the accident, within a day or two?

A. Yes.

Q. You were not seriously injured, were you?

A. I thought I was.

Q. There was no bones broken or no permanent injuries which you received?

A. No, sir.

[fol. 90] Q. And the railroad company very promptly paid you?

A. Yes, sir.

Q. How much?

A. I think that is immaterial.

Objected to as incompetent, immaterial, irrelevant, inadmissible.

Q. Did Mr. Lee tell you to object to it as incompetent and immaterial?

The Court: How is it competent?

Mr. Sullivan: On this question of Mr. Caldine's negligence and the cost it was to this company.

The Court: Have you any authority that makes that competent?

Mr. Sullivan: If he had been living and brought this action personally it would be a proper subject of a counterclaim because it arose out of the same transaction and here

we would have to put a claim against his estate for them to recover it in that way.

The Court: Have you any authority that makes that line of questions competent?

Mr. Sullivan: I ask it and I think it is competent.

The Court: Have you any authority?

Mr. Sullivan: I don't think it needs any authority.

The Court: I went looking after it after I heard the question to the jury last night, I did not find it.

Mr. Lee: Objected to as incompetent, immaterial, irrelevant.

Objection sustained. Exception.

[fol. 91] Q. They settled with you without any lawsuit?

A. Yes, sir.

Q. Very promptly?

Objected to as incompetent, immaterial, irrelevant, we cannot try a lot of lawsuits here at once.

Objection sustained. Exception.

Q. Were you sworn before the coroner?

A. Yes, sir.

Q. You didn't see him sitting on any bench at the depot?

A. See who?

Q. Mr. Dawson?

A. Yes, sir.

Q. Do you have a recollection of that now?

A. Yes, sir.

Q. Distinct recollection?

A. Yes, sir.

Q. Was this question asked you by the coroner: "Q. Did you see him sitting on the bench at the depot?" And did you answer: "I didn't notice whether he was. There was some men sitting there." Did you answer it that way?

A. I might have.

Q. Is your recollection better today, after talking with Mr. Lee, than it was then?

A. I haven't talked with him only what I have talked in the court house.

Q. You didn't walk out of the court house with him?

A. I went over to the corner with him but nothing said about it.

Q. Nothing said about the case?

A. No, sir.

Q. How do you account for your recollection varying on that proposition now?

A. I recalled to mind after I got more settled—that was only two or three days after I was hurt, I thought I was [fol. 92] pretty badly hurt, I couldn't collect my mind for sure whether I had seen him.

Q. After you discovered you were not badly hurt and settled with the company, you saw him sitting on the bench; it isn't material only question as to your veracity?

A. I recall the matter after I got better I saw him there.

Q. You heard Mr. Risley's testimony he found him in the baggage car mixed up with the milk cans?

A. Yes.

Q. You say the door of the baggage car was closed?

A. Yes.

Q. Did you observe the baggage car door afterwards?

A. Yes.

Q. You say there was a hole in it?

A. Yes.

Q. How big?

A. Big enough to throw a man through.

Q. How big?

A. Big as the panel of the door. As single panel in the door.

Q. What is the dimensions, about?

A. I think 20 inches in diameter and 5 or 6 feet in length.

Q. Twenty inches wide?

A. Yes, or more.

Q. Extending the full length of the door?

A. Very nearly full length.

Q. Did you testify to that before the coroner?

A. I don't remember, you have a copy of the minutes there; you ought to be able to tell it.

Q. You don't know whether the door was latched or not?

A. No.

Q. These men that found him in the baggage compartment inside of the door, notwithstanding that fact you say that the door was closed and he was at your elbow in the passenger compartment when the accident occurred?

A. Yes, sir.

[fol. 93] Q. You have a distinct recollection of seeing that bench where Mr. Dawson was sitting?

A. Yes, sir.

Q. In response to the question of the coroner when he asked you, "Did you see him sitting on the bench at the depot," did you answer in addition to the answer which I have read, "I did not notice whether he was; there was some men sitting there; my daughter sat next to the window, I couldn't see the bench unless I leaned over and looked in front of her"? Did you testify that way?

A. I must have, you have a copy there.

Q. Did you so testify?

A. I wouldn't say but what I did.

Q. And is it true now?

A. Well, yes, true now.

Redirect examination:

Q. At the time the coroner talked with you was just a few days after this occurrence?

A. Yes.

Q. And when you were under the care of a doctor and nurse?

A. Yes.

Q. And you are a man how old?

A. I am in my eighty-first year.

The plaintiff rests.

MOTION FOR NON-SUIT

Mr. Sullivan: If the Court please, on behalf of the defendant I move for a non-suit on the grounds that the plaintiff has failed to establish a cause of action, and that it appears affirmatively that whatever negligence has been shown by this defendant, if any, it was the negligent act of [fol. 94] the plaintiff's intestate and that the negligent act of the plaintiff's intestate in starting the car and in giving the signal to the motorman to start it and proceed down towards River Forks was the primary cause of the accident, and the efficient cause, and it precludes the plaintiff from recovering. And upon the further ground that the risk appearing here was a risk that was assumed by this plain-

tiff's intestate in his employment and service with this defendant company, and on the ground that they have failed to make out a cause of action or to establish any negligence on the part of this defendant.

The Court: I will take the verdict of the jury on it.

Motion denied.
Exception to defendant.

Harry A. Brohm, a witness called on behalf of the defendant, being duly sworn, testified:

Q. Where do you reside?
A. New Berlin.
Q. What is your occupation?
A. I am general manager of the Unadilla Valley Railroad.
Q. How long have you been engaged in that capacity as general manager of the defendant?
A. I was appointed general manager in 1916; nine years or a little better than that.
[fol. 95] Q. Prior to that how long had you worked for the Unadilla Valley Railroad Company?
A. Ten years.
Q. In what capacity during those ten years?
A. I have been auditor, general freight and passenger agent and assistant general manager, acting general manager and general manager.
Q. All during the last 18 years?
A. Yes, sir.
Q. Prior to that did you have service with the Pennsylvania Railroad and Lackawanna Railroad?
A. Yes, sir.
Q. How many years in all have you been engaged in the railroad service?
A. About 30 years.
Q. You live at New Berlin, N. Y.?
A. Yes, sir.
Q. And all your time is occupied in the performance of the duties which you have mentioned?
A. Yes, sir.

Q. On the day of this accident, at the time of the accident, where were you?

A. I was located at Leonardsville with the working troupe; we were waiting for the motor car to come along.

Q. Standing on the siding?

A. Yes, sir.

Q. Leonardsville is about five miles from Bridgewater?

A. Yes, sir.

Q. About two and a half miles south of River Forks?

A. Yes, sir.

Q. I show you Exhibit 1—I don't think I need to repeat it—that is the time-table that was in force at the time of the accident?

A. Yes, sir.

Q. For what was the purpose of this time-table?

A. Government of the trains; employees operating the trains.

Q. That was got out by whom?

A. Why, it is got out by me. That is, I am responsible for this.

[fol. 96] Q. Issued by you?

A. Yes, my name is right on it.

Q. Were these printed; several copies of them?

A. Yes, sir; we have quite a number of issues, we have to send them to the Interstate Commerce Commission, Public Service Commission and various uses.

Q. What other uses are the copies put to?

A. They are given to each employee that has anything to do with the operation of the trains.

Q. Are they stuck up in the depot?

A. Yes, sir.

Q. On the walls?

A. Yes, in each station or depot.

Q. And other stations that have a connection with your road?

A. Yes.

Q. Who delivers these to the employees?

A. They are sent by mail, addressed to each individual.

Q. I see this one went into effect on April 27, 1924?

A. Yes, sir.

Q. This time card?

A. Yes.

Q. Was that the time, the first time you used the Train No. 2, the gasoline car, as Train No. 2?

A. Yes, sir.

Q. After you had made arrangments with the Lackawanna to run over their tracks to Richfield Junction?

A. Yes, sir.

Q. And that is about how far from Bridgewater?

A. Five miles.

Q. I call your attention to the printed matter on the bottom of Exhibit 1, and ask you what it is; what that printed matter is?

A. Those are the rules and orders that govern the run-
[fol. 97] ning of these trains. Those orders on here are called positive orders—printed orders, permanent and positive. Show the government just as it says, for the government of the employees.

Q. In regard to the rules printed at the bottom of the time card is there any way that they may be modified or superseded?

Objected to line of proof, incompetent, immaterial, inadmissible testimony.

Objection overruled. Exception.

A. Only by written orders signed by my name.

Q. Have you a name that you call these orders by or number?

A. Yes, these are standard orders, one is 19 and the other is 31 order.

Q. I show you two orders that are pinned together and offered as Exhibit 4, and ask you if that is Order No. 19?

A. Yes, this is 19 order, standard order all over the country.

Q. Is there any custom or rule that will permit a train to deviate from the printed orders on Exhibit 1 without an Order 19 or 31 written, as Exhibit 4?

A. No, sir.

Objected to as incompetent, immaterial, irrelevant, incompetent evidence.

The Court: I think it is competent if you show it was brought to the plaintiff's knowledge.

Mr. Sullivan: I will do that.

Exception to the plaintiff.

Q. Prior to putting this gasoline car on—it was purchased from the J. G. Brill Company?

A. Yes, sir.

[fol. 98] Q. Do you remember when it arrived first at New Berlin, about how long prior to the time this time card went into effect?

A. The early part of March; I won't mention the day. I think it was the 7th of March.

Q. During that six weeks that transpired from the time the train was put into active operation for the public use, was there a man here from the J. G. Brill Company to instruct Dibble and Caldine in regard to running the car?

A. Yes, not so much Caldine as it was the motorman.

Q. In the operation of the engine on that car?

A. Yes.

Q. They were here for six weeks prior, from the 7th of March to the 27th of April?

A. Yes, sir.

Q. From time to time?

A. He was here right steady up to the time we put the car in service. Until he was satisfied that the operation of the car was perfect.

Q. Now, at the time Exhibit 1, this time-table, went into effect, did you have any talk with Mr. Harold Caldine in regard to the operation of this train or the execution of the orders?

A. Oh, yes.

Q. When was that?

A. Just prior to putting that schedule into effect.

Q. Did you talk it over with him?

A. Yes, sir.

Q. Do you remember what you said to him and he said to you? The substance if you do not remember the exact language?

A. I instructed him on the operation of the train and car and his performance and duties as conductor. And brought that time-table to his attention and asked him if he thoroughly understood it.

[fol. 99] Q. What, if anything, did you say to him about the positiveness of these orders?

A. I asked him if he did thoroughly understand that positive order on the bottom there, and he said, "Yes." I said,

"You know, Harold, you cannot come out of Bridgewater in violation of that order," and he said he did know it.

Q. What did you say to him in regard to any deviation from these orders, if anything?

A. I told him the only thing that would countermand that was 19 or 31 order.

Q. And this 19 or 31 orders was the written orders?

A. Yes, sir.

Q. Similar to Exhibit No. 4?

A. Yes.

Q. And the difference between 19 and 31 order is what?

A. 31 order is signed by the motorman and conductor.

Q. And 19 order is signed by you?

A. Both 19 and 31 order are signed by me, but 31 order is receipted for by conductor and motorman.

Q. Mr. Towner was your operator then?

A. Yes.

Q. And your passenger agent?

A. Yes.

Q. And dispatcher down there?

A. Yes, he had charge of issuing these orders.

Q. Did he have authority to sign your initials to the orders?

A. Yes, sir.

Q. The 19 and 31 order?

A. Yes, sir.

Q. Do you know whether or not it is the custom of railroads on which you have had experience for the dispatcher to sign the initials and name of the superintendent to all train orders?

A. They always do.

Q. And that is a long established custom?

[fol. 100] A. Yes. The superintendent is the man responsible for the operation of the train and he appoints the dispatcher to dispatch them in his name.

Q. On the O. & W., used to be U. C. H., now W. A. W.?

A. Yes.

Q. Is that a universal custom that has been long followed in railroading?

A. Yes. On the Lackawanna they sign F. C. initials, he is superintendent.

Q. Did you on more than one occasion have a talk with Mr. Caldine about his duties?

A. Oh, yes, I rode on that train. I rode that train about four or five days after it went into service, and the Sunday before this accident the motorman laid off, Saturday and Sunday and I operated the car as motorman and had Caldine as my conductor. On that trip I instructed him those days.

Q. You instructed him is rather general; what you said to him I would like to have you state or as near as you can recall it?

A. One of the things that I recall personally that he was not carrying out my instructions of standing on the back platform until he was out of sight of the station.

Q. That is the first you said about that?

A. Yes.

Q. What did you tell him about that?

A. My instructions to the conductor, to all conductors is to stand on the back platform after they start the train, stand on the back platform looking back at the station until out of sight of the station.

Q. What is the purpose of that?

[fol. 101] A. That is, any orders should come along, station agent should get any order to hold them up, the agent could run out and flag him and give him signal and they would be there to take it.

Q. On different occasions prior to June 25, 1924, did you give that instruction to Harold Caldine personally?

A. Yes, sir.

Q. Was it Sunday previous you rode with him?

A. Sunday previous to this accident. Motorman asked me to get off, and I was the only man at that time who knew how to operate that car in addition to that motorman. The motorman wanted to get off on an automobile trip and I let him off and operated the car myself on Saturday and Sunday.

Q. Are you familiar with the rules and customs and the duties and obligations of operating railroads?

A. Yes, sir.

Q. What is the duty of the conductor of a passenger train?

A. He is the man responsible for the running of the train; he is in full charge of the train; everybody is subservient; all the crew are subservient to the conductor.

Q. What are their duties in regard to starting of a train from the station, that is, from one station to another? The train has done its work at Bridgewater and has to move to the next station, can the motorman do that without a signal from the conductor?

A. Absolutely not.

Q. What is the standard signal, if there is one, of a conductor to his motorman to proceed to the next station?

A. Two bells to go ahead.

Q. Isn't that the general rule on all railrods, two bells to go ahead?

A. Yes.

[fol. 102] Q. I notice that is what they do?

A. Oh, yes.

Q. The bell on the front end of this car, that was operated by a cord that went the full length of the car?

A. Yes.

Q. If a man happened to be in the center of the train, by pulling that bell he could give a signal to start ahead?

A. Oh, yes.

Q. What is the signal to stop?

A. I think four short bells, or three, I am not sure.

Q. So, if the motorman or conductor is in the middle of the car doing work and he sees some emergency he can stop the car?

A. Yes.

Q. Or give a signal to stop?

A. Yes.

Q. Are you familiar with the operation of that car?

A. Yes, sir.

Q. The motor of it, and power of the engine?

A. Yes.

Q. About how far, going 20 or 25 miles an hour, about how long a distance can you stop, the distance on an ordinary track?

A. On the ordinary track, with a good rail, I should say you could stop that car within its length.

Q. That is how many feet?

A. About 42 feet. Less than that if you have a good rail.

Q. It was raining that morning?

A. No, I don't think it was raining; it was sort of misty morning; it rained after the accident, if I am not mistaken, but not up to the time of the accident.

Q. A wet rail, it depends—would you slide a little further?

A. No, a wet rail, after it gets wet, is a good rail; you wet a steel rail and it is a good rail; when it first starts raining it makes it a little slippery until they get good and wet.

Q. After the collision and your attention was called to [fol. 103] it and you came to the scene of the accident, what did you do?

A. I went right in to see who was in the car and what had happened.

Q. Did you discover anything about the motor, as to how many revolutions it was making when it stopped, when the accident hapened, the speedometer or something?

A. Yes, I was with the coroner and he picked up the indicator that is on that car; I think it showed 1,500 revolutions, showing it was going about 30 miles an hour, I should guess, something like that. I won't swear to that but that is as I recall it.

Q. That is your best recollection?

A. Yes.

Q. I call your attention to the map there; you have observed it?

A. Yes.

Q. This accident occurred at Scott's cut?

A. Yes.

Q. And about how far is that south of the depot, assuming that map was drawn to a scale one inch equals 200 feet?

A. I think this accident happened about 1,200 feet south or 1,400 feet south of the station.

The Court: Station at Bridgewater?

The Witness: Yes.

The Court: About a quarter of a mile?

The Witness: Yes.

Q. The printing on here, "Train 15 will take turntable siding at Bridgewater to allow No. 2 to pass"—step here, I think the arrow points north on the map?

A. Yes.

Q. This is station here?

A. Yes.

Q. This rectangular mark here near the Lackawanna tracks is depot?

A. Yes.

[fol. 104] Q. And the curve lines represent the Unadilla Valley Railroad track?

A. Yes.

Q. And when they come down from Richfield Junction they go to the intersection of these two roads?

A. Yes, sir.

Q. Take a switch and come around here?

A. Yes.

Q. After the switching operation takes place how long did they stand there at that station ordinarily?

A. If they run according to the time they would just be there about two to three minutes.

Q. From this depot, from the point in front of the depot, to the point of the switch where freight train was to go in on the switch, what is that, two inches?

A. Two inches.

Q. That would be about 400 feet?

A. That would be about 400 feet, it would be more than that.

Q. About two inches and a half?

A. Yes, four or five hundred feet.

Q. Now, is that little line standing on the right of your main track, and intersecting the circle, is that the turntable switch?

A. Yes, that solid line is track, that circle is turntable.

Q. Where you put engines and cars on and then turn them around and face in another direction?

A. Yes, sir.

Q. That must be about 300 feet in length?

A. Just about that.

Q. So that with safety a motor car could come down to a point about here, about No. 3 on the map and wait for the freight to go on?

Objected to as argumentative.

The Court: It is quite obvious.

[fol. 105] Mr. Sullivan: I think it is quite clear, but I just wanted to have it clearly shown is all.

Q. I don't think anybody that knows about it has explained 872, 2 on there?

A. 872 is number of the train from Richfield Junction to Bridgewater. No. 2 is number of the train after it leaves Bridgewater. 872 is Lackawanna designation of it.

Q. Where I have made a cross at the top of the column that is Train 2 going south bound?

A. Yes.

Q. And 15 going north bound?

A. Yes.

The Court: That is Freight Train No. 15?

The Witness: Yes, sir.

Q. After you came onto the scene of the accident and observed it, what did you discover there in regard to the extent of the accident, that is magnitude of it; did you see Caldine?

A. I found Caldine in the baggage car, laying across the baggage car floor. I won't say across the baggage car floor, he was laying on some cans there, crosswise of the car.

Q. With his head and feet crosswise of the car?

A. Yes.

Q. Were there some milk cans tipped over with some fish in?

A. Yes, those fish cans.

Q. Was there any other baggage in that car with the exception of fingerling and mail boxes, or bags you remember?

A. Mr. Hanrahan's dead body laying there.

Q. I am talking about baggage?

A. Trunk there.

[fol. 106] Q. Where did Mr. Hanrahan's body lay?

A. He laid just below the baggage car door, lengthwise of the car.

Q. I show you Exhibit 5, showing interior and ask you what that shows?

A. That shows interior of the baggage car.

Q. On this car in question?

A. Baggage compartment, yes.

Q. You are familiar with the car and that is correct representation of it?

A. Yes, sir. That is photograph of the car.

Exhibit 5 offered in evidence.

Received in evidence.

Q. As you came into the car you came in from the passenger end?

A. Yes.

Q. Could you indicate by a pencil about the position of Mr. Caldine's body, where was his head?

A. Mr. Caldine's head was over here.

Q. This is side of the car?

A. Yes.

Q. And this is the other side?

A. Yes.

Q. How wide is car?

A. Eight feet, close to nine feet, I can't tell you.

Q. Look at that blueprint to refresh your recollection?

A. Nine feet and one-quarter inch.

Q. On the inside?

A. Yes.

Q. Will you indicate with your pencil and show approximately your best recollection about the position of Mr. Caldine's body?

A. Mr. Caldine's body lay practically the way that little sign is there, just across the car. I think his head was over here.

Q. On the west side of the car?

A. Yes, his head was over here to the west, this would be east side of the car.

[fol. 107] Q. And his feet lying crosswise of the car?

A. Yes, sir.

Q. What is the construction of the door from the passenger compartment into the baggage compartment?

A. It is hardwood door.

Q. Did you notice to what extent that was broken?

A. It was rather splintered.

Q. Was there any panel taken out as big as a man's body?

A. Oh, no, no; just splintered, just a small splinter taken out of it. Maybe five or six inches wide and run down to a point.

Q. Was the door open when you went in or closed?

A. It was open when I went in.

Q. Was the lock broken? That is, did it indicate as if it had been pushed open and lock broken off or didn't you notice that?

A. I didn't notice that.

Q. Were you present when the coroner came?

A. Yes.

Q. That was Herman J. Haberer of Utica?

A. Yes.

Q. Did you see him remove anything from the person or pockets of Mr. Caldine?

A. Yes, I helped him remove contents of what was on Mr. Caldine's person.

Q. Aand handed them to him?

A. Yes, he asked me to do that.

Q. Did you find a copy of Exhibit 1?

A. Yes, found that time table right in Caldine's inside pocket, and I showed it to the coroner and I told him——

Objected to what he said. Sustained.

Q. You handed it to the corner?

A. Yes.

Q. And left it?

A. Yes.

[fol. 108] Q. Were these rules on there just the same?

A. Yes, sir.

Q. It is an exact copy?

A. Yes, sir.

Q. Were you present at the coroner's inquest or investigation when Mr. Dibble was sworn?

A. Yes, I went up to the hospital with the two interstate commerce inspectors.

Q. Did you have any conversation with Mr. Dibble as to how he happened to make this run—this all was in your presence; was this examination in your presence?

A. Yes, I asked Mr. Dibble before I sent him to the hospital.

Q. What did he say?

A. I asked him—of course, he was badly injured. I said, "Bid, how did you ever come to do this?" He said, "That is what I would like to know, Mr. Brohm, how we did it. Why we done it."

Q. Was the giving of signals to the motorman to proceed out of the Bridgewater yard on June 25, 1924, as described by the witnesses here a violation of the rule printed upon Exhibit 1?

Objected to as incompetent, improper, inadmissible and illegal testimony.
Objection overruled. Exception.

A. It was not a violation until they came to the passing point.
Q. It was not a violation?
A. You asked me when they left the station?
Q. At Bridgewater yard was giving a signal to proceed with the train a violation of this rule?

Objected to same as before.
Objection overruled. Exception.

A. Yes.

[fol. 109] Q. You mean Bridgewater is passing point?
A. Yes.
Q I have assumed that the train was at Bridgewater?
A. Yes.

Cross-examination:

Q. You are still holding that position you have as general superintendent?
A. Well, up until I saw my employer the other day I was.
Q. You live at New Berlin now?
A. Yes.

Mr. Sullivan: I did not understand the answer?
The Witness: He asked me if I was holding my position now. I told him I was until the other day; I don't know whether I am now.

Q. You don't mean to tell the jury you are not general manager, do you?
A. Yes, I am general manager, I think.
Q. You are interested in this case as general manager, aren't you?
A. Yes, sir.
Q. You have took enough interest this noon when this Elting girl was here to follow her on the street?

A. No, I met her in the court room.

Q. You talked with her after she testified?

A. Yes.

Q. You went after her because she testified for the plaintiff?

A. No, sir.

Q. You were down in Leonardsville when this accident happened?

A. Yes.

Q. You went right up where these bodies of the dead was?

A. Yes.

Q. Did you take anything out of his pockets?

A. I did after the coroner told me to.

[fol. 110] Q. Did you before that?

A. No, sir.

Q. Not a thing?

A. No, sir; absolutely, I thought too much of him.

Q. Did you take anything out his pockets?

A. I don't like that.

Q. I asked you whether you did or not?

A. No, of course not. I don't believe I look like a man that would steal from a dead man.

Q. Did you look at his clothes or in his pockets before the coroner came there?

A. No, I laid the man out on the road and covered it and drove the crowd away.

Q. He had been on the road working for you how long?

A. He had been working for us three or four years.

Q. Very competent, trustworthy boy?

A. Yes, indeed.

Q. Very competent?

A. Yes.

Q. You believe it, don't you?

A. I did, I thought a lot of him.

Q. You can read pretty good, can't you?

A. Absolutely.

Q. Stand up before the jury so that they can read this, you don't mind that?

A. No.

Q. Come here. This says up at the top, "Unadilla Valley Railway time-table No. 67?"

A. Of course.

Q. Then you have on there "For the government and information of employees only?"

A. Yes.

Q. Did you stick that up in stations?

A. Yes.

Q. Because I saw them in your station?

A. We have them in all stations.

Q. Where you have for the government and information for the employees only?

A. Yes.

[fol. 111] Q. And then you have in fine print, "Subject to change without notice," isn't that so?

A. Yes, sir.

Q. So it could be changed at any time?

A. Yes.

Q. Without notice?

A. Without notice, yes.

Q. Did you see Caldine's watch?

A. Yes.

Q. What time did it register at the time of the occurrence?

A. I think it was registering, as I recall, I think it was ten minutes past eight. I am not sure.

Q. Is your recollection any better today than it was before the coroner on the 26th day of June?

A. I don't think so.

Q. You don't think it was better that day?

A. No, I think my recollection is the same every day.

Q. You can remember things today that happened a year ago as the day after the accident?

A. Yes.

Q. (Reading): "Did you know Mr. Caldine's watch had stopped?

"A. Yes.

"Q. Is that his watch?

"A. Yes.

"Q. It stopped at 8:16, is that right?

"A. I just said 8:10.

Q. This was only six minutes out of that way, was 8:16 right?

"A. Yes, I was looking at the watch when I said 8:16."

Q. You were so insistent; you knew so much about it?

A. No, I didn't insist. I said I thought it was 8:10.

Q. As I understand it in discussing this matter with counsel you are sort of a fellow that gives them all orders and directions, is that it?

A. Yes.

[fol. 112] Q. And you have been so long at this railroad job you know what the orders are and all and everything about railroading?

A. I know what those orders were.

Q. You are the fellow that gave Caldine instructions?

A. Yes, sir.

Q. You talked with him a lot of times?

A. Yes.

Q. You assumed to know the rules and regulations and all that concerning this road?

A. Yes.

Q. Because of the position, what position do you hold?

A. General manager.

Q. Now, you told the jury you have run the motor, and you told Caldine orders; tell the jury what the signal is to stop a car?

A. That car?

Q. Yes?

A. Why, I think it is three bells.

Q. Did you know it is always one short to stop a car?

A. Is that so; that might be.

Q. And you are the fellow that gave Caldine his orders?

A. Yes, he had his instructions.

Redirect examination:

Q. Counsel examined you with reference to certain printed portions on this time card. You stated they are up in all stations?

A. Yes.

Q. In the waiting room?

A. Yes.

Q. For what purpose?

A. For the government of employees.

Q. Is there any other purpose that suits the convenience of passengers in knowing when trains leave that are waiting. Knowing when the trains are to arrive and leave?

A. Yes.

[fol. 113] Q. Is that what they are posted in the waiting rooms of the depots for?

A. Yes.

Q. Is that subject to change without notice refer to the public; that they can change the time without publishing any notice?

A. Yes, if we issue another order that countermands that time-table there. It is issued without notice to the public but it is just issued to the trainmen.

Q. For the convenience of the public this is posted in the waiting rooms?

A. Yes.

Q. And these are put there for that purpose?

A. Yes, subject to changes.

Hilda Jenkins Van Buren, witness being duly sworn, testified as follows:

Q. Where do you reside?

A. New Berlin.

Q. What is your occupation?

A. Housewife now.

Q. Prior to being married you were a music teacher?

A. I was.

Q. And gave lessons at New Berlin?

A. Leonardsville, West Edmeston, River Forks and Bridgewater.

Q. As well as New Berlin?

A. Yes.

Q. Were you passenger on Train No. 2 at the time of the accident.

A. Yes.

Q. Where did you board train?

A. At Bridgewater.

Q. Were you seated on the right hand side of car?

A. Yes.

Q. As it was moving south?

A. Yes.

[fol. 114] Q. Did you see Mr. Dawson there at the station?

A. I did.

Q. You are acquainted with him?

A. Very well.

Q. You have traveled up and down that valley for a number of years?

A. Indeed I have. A great many times.

Q. You are well acquainted with Dawson?

A. Yes.

Q. What did you see him do while the train stayed at Bridgewater, if anything?

A. Mr. Dawson left the station ahead of me and went to the baggage part of the car where he assisted with the baggage unloading and with the mail.

Q. That was the head end of the car where Dibble was?

A. Yes.

Q. How long did the car stop there after it come around in front of the depot off the Lackawanna tracks?

A. It was but a very few minutes; in fact less time than it had ever stopped before.

Q. What would you say, give me your best information, a minute or two minutes, it has been estimated anywhere from two to three or half minutes?

A. It might have been two or three minutes.

Q. Did you see Mr. Caldine?

A. He assisted me on the car.

Q. After you got on the car what did you see him do?

A. He stepped on the car and gave the signal to go.

Q. What did he do?

A. Two bells, he rang two bells.

Q. And then what did you notice that he did?

A. He came through the car and took tickets from the passengers.

[fol. 115] Q. And then what?

A. As I remember Mr. Caldine he passed through the car.

Q. Through the car?

A. Through the car.

Q. And into the baggage room?

A. I remember him as he stood at the door.

Q. Door of the baggage room?

A. I remember that he stood there.

Q. In the open door of the baggage car?

A. The door was closed. I remember that he stood there to go through but the crash came so soon after I don't recall.

Q. Whether he turned the knob or not you don't know?

A. As I picture him he stood with his hand on the knob.

Q. And you positively saw Dawson at the baggage car door where Dibble was?

A. I did, yes.

Cross-examination:

Q. Were you at the station before the gas car came in from the north, weren't you?

A. I was.

Q. Were you there when Dawson received the telephone call?

A. I was.

Q. Did you hear him answering the call?

A. I did.

Q. Do you remember what he said at his end of the line?

A. He repeated what Mr. Risley said, "You are coming."

Q. What did he say?

A. "You are coming and to hold train," and he repeated the message Mr. Risley gave him.

Q. Repeated it after him?

A. Yes.

Q. Just what was it he said?

A. "Hold train, we are coming."

[fol. 116] Q. He just repeated back so that he was sure he got what he said?

A. Yes.

Q. What did Mr. Dawson reply to Risley?

A. I don't remember any reply except to repeat.

Q. Did you hear him say all right, come on?

A. I don't remember that.

Q. So that you knew then that he had telephoned?

A. Yes.

Q. Had you been there before?

A. Where?

Q. At the station at different times when Risley phoned?

A. No.

Q. Never before?

A. Not that I recall.

Q. You did come every week up in that country?

A. Yes.

Q. When the gas car came in did you see Caldine come into the station?

A. I did.

Q. Was he walking leisurely?

A. He was walking.

Q. How was he walking?

A. I didn't notice.

Q. Did you see Mr. Dawson when he went by?

A. I did.

Q. Did you notice him pass Mr. Caldine?

A. I did not. He went out before Mr. Caldine came from the car.

Q. After Mr. Caldine went back out, he went out and helped the passengers on the car?

A. He did, there was only one.

Q. That was you?

A. Me.

Q. Was he back end or front end of the car?

A. He was at the rear of the car.

Q. Was he facing the front of the car?

A. He stood at one side of me to assist me on. I don't know where he was facing.

[fol. 117] Q. At the time you heard the telephone conversation between Dawson and Risley the gas car had not arrived from the north yet?

A. It had not; but the whistle was blown for the station shortly after that.

H. A. Bloom, recalled.

Redirect examination:

Q. Are you acquainted with the value of the car that was operated by Caldine and Mr. Dibble and that was involved in this accident?

A. Yes, sir.

Q. What was it worth at the time of this accident, immediately previous to the accident?

Objected to at this time, its value is immaterial. Incompetent, inadmissible testimony.

Objection sustained. Exception.

Q. You saw it after the accident?

A. Yes, sir.

Q. Do you know what its value was then?

Objected to, that testimony is improper and incompetent and illegal testimony.

Objection sustained. Exception.

Mr. Lee: At this time in view of counsel in his opening discussed this question of property and damage and alleged damage to car, and all that, and asked the jury to take it into consideration in arriving at a verdict, may I ask you to instruct the jury now or later that question is not to be taken into consideration.

[fol. 118] The Court: Yes, I will instruct them.

Exception.

Mr. Sullivan: I offer in evidence a certified copy of judgment in favor of Catherine B. Hanrahan against the Unadilla Valley Railway Co., and I offer in evidence testimony which I offered for the purpose of recoupment of damages, if that question should be reached by the jury, to show the damage that the plaintiff's intestate's negligence has cost this defendant.

Objected to, incompetent, immaterial, irrelevant, illegal testimony.

Sustained. Exception.

Evidence closed.

Motion for Nonsuit

Mr. Sullivan: At this time I desire to renew my motion, and do renew my motion for a nonsuit upon the grounds stated at the close of plaintiff's case, and upon the further ground that it now affirmatively appears that the accident in question was solely caused by the negligence of the plaintiff's intestate, Harold E. Caldine.

Motion denied. Exception.

Mr. Sullivan: I ask the Court to instruct the jury to render a verdict for the defendant.

The Court: Request and motion denied. Exception.

Mr. Sullivan: Will you give a few suggestions as to what we are to sum up on?

The Court: Without saying this, as all the law in the case at this time, the question we have to consider under the Federal Employer's Act would be: 1, was the accident caused in whole or in part by an agent or employee of the defendant railroad company, other than Caldine? That is, [fol. 119] the argument of the plaintiff is that the accident was caused either wholly or in part by the negligence of the station agent at Bridgewater, Mr. Dawson. And I shall submit to the jury the question of whether the accident was the result of the negligence of Mr. Caldine alone; whether it was the result of the negligence of Dawson alone and the death of decedent was the result of an accident for which no one was negligent. And their assumed risks. Those are about three questions. I don't say that is all the law in the case.

Counsel sum up.

Charge to jury follows:

CHARGE TO JURY

HILL, J.:

GENTLEMEN: This is a state court, but this action, as is permitted, is brought under a United States statute commonly known as the Federal Employer's Liability Act, which provides, in substance, that in case of the death of an employee of a railroad company an action may be brought by his personal representative for the benefit of his father, if there be no nearer relative, and that a recovery may be had if death resulted, in whole or in part, from the negligence of any of the officers, agents or employees of the railroad company.

If this decedent, Harold Caldine, died as the result of [fol. 120] an accident for which he alone was to blame there can be no recovery. If he died as the result of an accident or collision which occurred through the negligence neither of himself or any of the employees of the railroad company the plaintiff herein cannot recover, for when decedent went into the employ of the railroad company he as-

sumed the ordinary risks, and known and obvious extraordinary risks of the employment of railroading in which he engaged to work. Ordinary risks which were assumed by him are those that are normally incident to the occupation in which he was voluntarily engaged. He was presumed to have knowledge of such risks and assumed the danger of injuries arising therefrom. If he knew of any defect or imperfection in the rules of the defendant, appreciated the risks incident to such lack of proper rules and continued in his employment without objection, he assumed the risks incident thereto.

To repeat, his representative may recover in this action only in event that his death was occasioned by an accident caused from the negligence, in whole or in part, of some officer, agent or employee of the railroad company, the defendant, other than himself, Harold E. Caldine.

There is little dispute as to the facts in the case. A gasoline car, known as Train No. 2, upon which the decedent was conductor and a man by the name of Dibble was motorman, was in a place of safety at the station known as Bridgewater at the northerly end of the defendant's line; a freight train, known as Train No. 15, was going northerly on its journey from New Berlin to Bridgewater. The gas [fol. 121] car, by reason of the directions of the decedent left Bridgewater station, going southerly upon this one track railway and upon a curve in a cut where vision for any considerable distance ahead was cut off came in head on collision with Train 15. Plaintiff's intestate died as the result of such collision. A concession was made that the plaintiff, the father, has been regularly appointed the administrator, and that the defendant, the railroad company, at the time of the injury was engaged in interstate commerce, and that Harold E. Caldine, the plaintiff's intestate, was likewise engaged in such commerce, so that the Employer's Liability Act, which I have mentioned, applies.

The defendant, the railroad company, had prepared a printed time-table and there appeared thereon a rule or a direction which said that Train No. 15 and Train No. 2 would meet and pass at Bridgewater station. In spite of such rule, plaintiff's intestate gave a signal and Train No. 2 went out upon the track to the collision. Prior to the time Train 15 had left the station two miles southerly from

Bridgewater, known as River Forks, Mr. Risley, the conductor, telephoned to the station agent at Bridgewater, Mr. Dawson, that Train 15 was leaving River Forks, northerly bound, and to hold the gasoline car, Train 2, at Bridgewater. The station agent, Dawson, states that he received such message; that Caldine, the decedent, as conductor was in charge of the train; that he did not communicate such information to him but that he did tell Dibble, the motorman. Dibble, the motorman, testifies that he has no recol- [fol. 122] lection of being told. Dawson states that he did not tell Caldine because he was some distance away, being at one end of the car and Caldine at the other. The station agent says that he saw Caldine give the signal to pull out and did nothing to stop the car, that he was busy. Two passengers upon the car, Mr. and Miss Elting, testify Mr. Dawson was sitting on a bench when the train pulled out. A man is negligent when he commits a thing or commits an act which an ordinarily careful and prudent man would not do or commit under the circumstances, or when he omits to do a thing which an ordinarily careful and prudent man would have done under the circumstances.

In this case, gentlemen, the burden of proof as to the negligence of the station agent Dawson is upon the plaintiff, the administrator of the decedent, Caldine. And by that burden of proof is meant that he must establish the negligence of Dawson by a fair preponderance of evidence, as I have defined negligence to you. By a fair preponderance of negligence is meant more evidence in favor of his contention that there is opposed to it. I say more evidence, I do not mean more witnesses but evidence which to your minds has the greatest probative force, which is the most convincing. Upon the question of the negligence of the decedent, Harold Caldine, the defendant, the railroad company, has the burden of proof, because this statute says when a man has died that the burden of proof is upon the defendant to show his negligence contributed to the happening, and, of course, the burden of proof is on the railroad [fol. 123] company to show Caldine's negligence and is exactly the same as I defined it to you a moment ago. You will take up and consider and determine under the facts presented whether Harold Caldine was negligent as I have defined negligence to you when he gave directions that the car

be started and when he caused it, as conductor, to continue upon its course to the point of collision. In determining that consider the statement printed upon the time-table and all the facts in the case which will aid and assist you in determining the question. If you should determine that he was negligent, you will then consider whether or not his negligence, in so starting the car before Train 15 had arrived at Bridgewater and in permitting it to continue to the point of the accident, was the sole cause of the accident and collision. If it was the sole cause of the accident and collision then plaintiff may not recover and your verdict would be no cause of action, but if you determine that his act was not the sole cause of the collision, or that he was not negligent in any degree, you will then consider whether the act of Dawson, the station agent, in omitting to communicate the telephone communication which he received from Risley was negligence, and whether such negligence caused or contributed to the happening of the accident, or whether the accident would not have happened if he had communicated the message to Caldine. In determining that point you may consider whether under all the facts proven in the case it was the duty of Dawson to communicate the information which he had received from Risley by [fol. 124] phone, because if he was not required and it was not his duty to communicate this information that will aid you in determining whether or not his conduct was that of an ordinarily careful and prudent man having knowledge of railroad affairs and administration.

When I speak of negligence and define an ordinarily careful and prudent man to you, I mean a man of ordinary skill and knowledge in the business in which he was engaged. It was the duty of the railroad company to fill their stations and positions with such men.

If you determine the plaintiff is entitled to recover because of the accident, and that the decedent's death was occasioned in whole or in part, from the negligence of Dawson you will then determine, under the law as I am about to give it to you now, the amount of damage which the plaintiff should recover.

If the accident was caused solely by the negligence of the railroad company, and if plaintiff's intestate was guilty of no negligence that contributed, then the plaintiff herein would be entitled to recover such a sum of money as would

compensate him for his pecuniary loss. He would not be entitled to recover any sum for sentimental damages nor for the grief and sorrow which he has suffered incident to the loss of his son, but only such a sum of money as you determine that he would have received from his son, Harold Caldine, had Harold not died as the result of such accident. How much money each week or each month would the father have received? To aid you in determining this, if you arrive at the point or question of damages, [fol. 125] you may consider the habits, industry, the health and disposition of Harold Caldine; you may consider the age and dependence of the father, the administrator who has been sworn, if such information will aid you in determining and arriving at the proper amount. To arrive at the amount of loss is somewhat speculative for your determination should be limited to the amount of pecuniary loss and nothing, as I say, for sentimental loss. If any of you have been present in state courts you probably have heard the doctrine which ordinarily is the rule that the plaintiff may not recover if he, or in this case his intestate, was guilty of any act of negligence which contributed to the happening of the accident. That is true in many cases which are tried here. Such is not the law in this case; there is a different rule. Here, in the event you find the plaintiff's intestate guilty of contributory negligence you should reduce the damages which I have just mentioned in proportion to the amount of negligence which is attributable to him, if you determine that the defendant was negligent, that is, if the station agent Dawson was negligent and if you determine that his negligence contributed to the happening of the acident, and that the decedent, Harold Caldine, was also negligent in a way that contributed to the happening of the accident you should determine how much or what proportion of the whole damage or fault should be attributed to each, and you will determine the amount of damage suffered through the combined negligence and deduct therefrom a proportion corresponding with the measure of damages charged against the plaintiff's intes- [fol. 126] tate. In other words and again using substantially the language of the statute, in the event you find that Harold Caldine was guilty of negligence that contributed to the happening of the accident you should reduce the

plaintiff's damages in proportion to the amount of negligence which is attributable to Harold Caldine.

Again assuming that the whole damage which the father has suffered, the whole pecuniary damage, is one hundred per cent. If the damage was caused by the combined negligence of Caldine and Dawson what proportion is attributable to Caldine and what proportion is attributable to Dawson. If Caldine's negligence was one-quarter of all the negligence then the plaintiff may recover only three-fourths of one hundred per cent, or seventy five per cent of the whole pecuniary loss of the father. If Caldine's negligence was, say one half of all the negligence, then the plaintiff may recover only one half of one hundred per cent or fifty per cent of the whole pecuniary loss of the father.

Gentlemen, take the case. I have discussed damages with you, but remember that if the accident happened solely through the negligence of Caldine the plaintiff may not recover. If the accident happened through the negligence of no one and was an assumed risk, the result of an assumed risk as I have defined it to you, plaintiff cannot recover. If it happened through decedent's own negligence and the negligence of Dawson he may then recover, as I have defined the damages to you, full amount as reduced as I have stated to you.

[fol. 127] Take the case, consider it and return such verdict as to you seems just and proper between the parties.

Mr. Sullivan: I ask your Honor to charge if the jury find Mr. Caldine, the decedent, wilfully disobeyed a rule made for his safety and that of others that may be affected, without a reasonable excuse he departs so far from the line of his duty as to sustain the relation of master and servant, and if he is injured by his disobedience of this rule the defendant is not liable.

The Court: I charge that, but I call your attention to the word "wilfully" used in the first part of it.

Exception to the plaintiff.

Mr. Sullivan: I ask your Honor to charge the jury if they find that the rule printed on the time card for Train 2 to meet Train 15 in the Bridgewater yard, was permanent and positive and could not be superseded or modified with-

out a written order on Form 19, then Dawson owed no duty to Mr. Caldine.

The Court: I decline to charge that.

Exception to the defendant.

Mr. Sullivan: I ask your Honor to charge that, if the jury find that the accident was caused by the negligence of Caldine primarily that he cannot recover upon the theory that other employees of the defendant were bound to look out for the approaching Train No. 15 and their negligence contributed in an approximate way to the death of this conductor.

The Court: Primarily?

Mr. Sullivan: Yes.

[fol. 128] The Court: I will so charge calling your attention again to the word "primarily."

Exception to the plaintiff.

Mr. Sullivan: I ask your Honor to charge the jury that in order to allow the plaintiff to recover in this action, directly due to the failure of Caldine to observe the rule as to meeting of Train 15, that he cannot recover on the ground that possibly it may have been prevented if those in the secondary relation to the movement had done more.

The Court: I decline to charge that.

Exception to defendant.

Mr. Sullivan: That in order to find any damages for this plaintiff that it must appear to the satisfaction of the jury, some reasonable satisfaction of pecuniary loss, assistance or support of which he has been deprived, but that compensation for such loss does not include any damages by way of recompense for grief or wounded feelings.

The Court: I so charge.

VERDICT

Jury retire. Jury return a verdict of $2,200 in favor of the plaintiff.

The Court: Mr. Sullivan reserves the right on behalf of the defendant to move as he may be advised tomorrow forenoon with the same force and effect as if the motion were made at the coming in of the jury.

[fol. 129] September 9, 1925, at 9:30 A. M.

Motion for New Trial

Mr. Sullivan: If the Court please, in behalf of the defendant I now move for a new trial and to set aside the verdict, and to dismiss the complaint, upon the ground that the verdict was contrary to law and contrary to the evidence and excessive, and upon all of the grounds mentioned in Section 549 of the Civil Practice Act, and I make this motion upon the minutes of the trial, and also upon the Judge's minutes by reason of errors committed upon the trial.

The Court: I will entertain this motion and will hear the counsel thereon at my Chambers on September 19th, 1925, at 10 A. M., at which time counsel may submit briefs.

[fol. 130] In Supreme Court of New York, County of Chenango

[Title omitted]

Order of Substitution—December 5, 1925

On the annexed consent, it is hereby

Ordered, that Glenn F. Carter, of the City of Norwich, County of Chenango, and State of New York, be and he hereby is, substituted as attorney for the plaintiff in the above-entitled action, in the place of David F. Lee.

Dated, December 5, 1925.

(Sd.) James P. Hill, Justice Supreme Court.

[fol. 131] In Supreme Court of New York, County of Chenango

[Title omitted]

Judgment

The issues in this action having been tried at a Trial Term of the Supreme Court, held at the Court House in the City of Norwich, New York, in and for the County of Chenango, on the 8th day of September, 1925, before the Hon. James P. Hill and a jury, and the jury having found a verdict for said plaintiff and against the said defendant herein in the sum of Twenty-two hundred dollars ($2,200) damages, which verdict has been entered in the minutes of the said Court;

Now, on motion of Glenn F. Carter, plaintiff's attorney, it is hereby

Adjudged, that the plaintiff, Ernest Caldine, recover of the defendant, Unadilla Valley Railway Company, the sum of Twenty-two hundred dollars ($2,200), found by said jury, together with the sum of One hundred and fifty dollars and twenty-one cents ($150.21), costs and disbursements, as adjudged, amounting in all to the sum of Twenty-three hundred and fifty dollars and twenty-one cents ($2,350.21), and that the plaintiff have execution therefor.

Judgment signed and entered this 7th day of December, 1925, at 9:45 o'clock in the A. M.

(Sd.) Irving J. Tillman, Clerk.

[fol. 132] In Supreme Court of New York, County of Chenango

[Title omitted]

Order Denying Motion for New Trial

The issues in the above-entitled action having been duly brought on for trial before Hon. James P. Hill, a Justice of this Court, and a jury, at the above term of this Court, and the jury having rendered a verdict for the plaintiff and

against the defendant for the sum of Two thousand two hundred dollars ($2,200.00), and William H. Sullivan, attorney for the defendant, having moved for a new trial and [fol. 133] to set aside the verdict and to dismiss the complaint, upon the ground that the verdict was contrary to law and contrary to the evidence and against the weight of evidence and excessive, and upon all of the grounds mentioned in Section 549 of the Civil Practice Act; and said motion having been also made upon the Judge's minutes by reason of alleged errors committed upon the trial; and the said Justice having entertained and heard the said motion, and David F. Lee, Esq., attorney for the plaintiff, appearing in opposition thereto, it is hereby

Ordered, that the said motions be and the same are hereby denied, and that the plaintiff may tax his costs, enter judgment and serve a copy with notice of entry, and that execution upon the judgment so entered be stayed for a period of thirty days, and if the defendant serves a notice of appeal from said judgment and this order within thirty days, that the defendant have a stay of execution for sixty days thereafter; and that the defendant have thirty days after the service of the notice of appeal herein in which to make and serve a case and exceptions herein.

Dated, December 11th, 1925.

Enter.

James F. Hill, Justice of the Supreme Court.

[fol. 134] In Supreme Court of New York, County of Chenango

[Title omitted]

Notice of Entry

Sir: You Will Please Take Notice of an Order granted in the above entitled action, a copy of which you are herewith served, and which order was duly entered in Chenango County Clerk's Office on the 15th day of December, 1925.

Dated December 15th, 1925.

Yours, &c., Wm. H. Sullivan, Defendant's Attorney. Office & Post Office address: Norwich, Chenango Co., N. Y.

To Glen F. Carter, Esq., Plaintiff's Attorney, #42 North Broad Street, Norwich, New York.

[fol. 135] In Supreme Court of New York, County of Chenango

[Title omitted]

David F. Lee, attorney for plaintiff.
William H. Sullivan, attorney for defendant.

Opinion

Hill, J.:

This is an action under the Federal Employers' Liability Act for causing the death of plaintiff's intestate. The action has been tried, the jury returning a verdict in favor of the plaintiff for $2,200. Motion is made to set aside the verdict, and for a new trial.

Decedent was conductor upon a gasoline passenger car. It came in collision with a steam train, also operated by defendant, a short distance south of defendant's most northerly station, Bridgewater. A printed order of the defendant required the gas car to remain at the Bridgewater station and there meet the steam train. In violation of this order, the gas car, under decedent's direction, started its journey, with the resultant collision. Before the [fol. 136] steam train started from the first station south of Bridgewater, the conductor telephoned to the station agent at Bridgewater, saying that he was leaving, and to keep the gas car there. The steam train was a few minutes late. Dawson, the station agent, testifies that he gave such information to Dibble, the motorman, but he has no recollection of being told. The station agent saw the decedent give the signal for the gas car to start and did nothing to prevent the leaving. The station agent was examined at some length as to whether the gas car ordinarily would start and run a short distance from the station to the head of the switch upon which the steam car was accustomed to go upon its arrival in the station, and there wait. He does not say that he ever saw this done, although he mentions a custom upon another railroad whereby a meeting train

would run to the far end of the switch and remain there until after the passing of the train it was to meet, in order to gain the time of such run. Unquestionably decedent was negligent. The question presented is whether, under the facts stated, as a matter of law, Dawson's conduct in failing to tell the conductor who had charge of the movement of the gas car, was negligent. And whether, when he saw decedent giving the signal for the gas car to start he was required to take some steps in an effort to prevent the fatal journey. In other words, did the collision "result in part" from Dawson's failure to tell Caldine and to act in an effort to prevent the starting of the car when he saw the signal given. It was a custom for the conductor of the [fol. 137] steam train to telephone before he started from the station south of Bridgewater. Dawson's custom, upon receiving such a telephone, is shown by the following evidence:

"Q. Isn't it a fact that a number of times this man Risley phoned to you as station agent and operator there that he was coming and to hold the gas car?

"A. Yes.

"Q. Hadn't he done that before that time?

"A. Yes, several times.

"Q. And it had been a custom of yours to go out and tell them they were coming?

"A. Yes.

"Q. And that is the custom while the train was on there?

"A. Yes.

"Q. And you told Caldine, didn't you?

"A. Yes, sir.

"Q. But this morning, you didn't tell him?

"A. No.

"Recross examination:

"Q. Counsel asked you if it was your custom to go and tell 'em the car was coming? What do you mean by 'em?

"A. The motor crew.

"Q. Sometimes the motorman and sometimes the conductor?

"A. Yes.

"Redirect examination:

"Q. Isn't it a rule when you give orders to give it to both?

"A. I had no orders.

"Q. Didn't you tell the jury a few minutes ago you usually told Caldine?

"A. Yes, that isn't an order.

[fol. 138] "Q. It is what you call it, but at least you told him?

"A. Yes."

Was Dawson's conduct a proximate cause of the accident? Had he told Caldine, as was his custom, would the accident have happened? If so, the collision may be attributed to that act as well as to the negligence of Caldine in violating the written rule to meet the steam train at Bridgewater. May we say either that Dawson's failure was not negligence or that if he had given the usual notice to Caldine, the accident would have happened just the same.

The station agent saw the signal given for the gas car to start. He was then at the front end of the car. The full length of the car was sixty feet. Dawson was something less than that distance from the point where the conductor gave the signal to start. Unquestionably Dawson would have had opportunity either to have shouted to the conductor when he saw the signal given, or when the car had traveled its length and the end of the car would be opposite him, he could then have warned Caldine. If this was negligence on Dawson's part, it was a proximate cause, for it was a failure to prevent this car from starting and from being at the point where the collision occurred. "But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty, neither train would have been at that place." Union Pacific R. R. Co. v. Hadley, 246 U. S. 330 333.

While it is certain that negligence of the railroad company which would permit a recovery must be a proximate [fol. 139] cause of the injury, it does not seem that such negligence has a necessity to be the very last item of negligence which caused the accident, for Justice Holmes in the opinion in the above cited case on the same page with the above quotation, says:

"But even if Credit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

This case was tried and submitted upon the theory of the concurring negligence of Dawson, the station agent. But as I review the circumstances of the accident, the question comes into my mind, if Dibble the motorman, did not by his conduct, contribute to the happening of the event. The printed rule that the gas car should meet the steam train at Bridgewater was known to him and was made for his government and control quite as much as for the decedent's. Dawson says that he told Dibble that the conductor of the steam train had telephoned and to wait. Dibble says he has no recollection of being told. True, Caldine was the conductor and the car moved when he directed it, by signal, but it was hardly Dibble's duty, like a soldier on the field of battle, to move forward at the command, even to a head-on collision and death. The duties of a motorman are comparable with those of an engineer. They each have physical control of their train. Can it be said that Dibble by proceeding, even if Caldine told him to, in [fol. 140] violation of the orders and after having been told a minute before he started upon the journey that the steam train was coming, was not guilty of negligence which was a proximate cause of the accident?

Virginian Ry. Co. v. Linkous, 230 Fed. Rep. 88.

N. Y. Central & St. Louis R. R. Co. v Biebel, 214 Fed. Rep. 952.

"It is also the settled rule in all actions of negligence that where several proximate causes contribute to an accident, and each is an efficient cause without which the accident would not have happened, it may be attributed to all or any of them, but it cannot be attributed to a cause unless without its operation the accident would not have happened."

Rider v. Syracuse R. T. Ry. Co., 171 N. Y. 139-155.

Believing that the jury were justified in finding either that Dawson was guilty of a negligent act which was a proximate cause, or that Dibble was guilty of an act which was a proximate cause, or that both of them were guilty

of acts which were proximate causes, I deny the motion for a new trial.

[fol. 141] In Supreme Court of New York, County of Chenango

[Title omitted]

Notice of Appeal.

Sirs: Take Notice, that the defendant, Unadilla Valley Railway Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Third Department, from the judgment of the Supreme Court herein entered in the County Clerk's Office of the County of Chenango, N. Y., on the 7th day of December, 1925, in favor of the plaintiff, and against the defendant for the sum of Twenty-three hundred and fifty dollars and twenty one cents ($2,350.21) damages and costs, and from the Order denying defendant's motion for a new trial, and to set aside the verdict herein, entered in Chenango County Clerk's Office on December 15th, 1925, and from the whole of the said judgment and order.

The defendant and appellant herein intends to bring up for review upon such appeal all of the questions of law [fol. 142] and the facts, the decision of the Trial Court denying defendant's motion for a new trial and to set aside the verdict, and all of the defendant's exceptions herein.

Dated December 22nd, 1925.

Yours, &c., Wm. H. Sullivan, Attorney for Defendant and Appellant. Office and Post Office address: Norwich, Chenango Co., N. Y.

To Glenn F. Carter, Esq., Attorney for Plaintiff and Respondent, No. 42 North Broad Street, Norwich, New York, and to Irving J. Tillman, Esq., County Clerk of Chenango County, N. Y.

[fol. 143] In Supreme Court of New York, County of Chenango

[Title omitted]

Stipulation Settling Case and as to Exhibits

It is Hereby Stipulated, that the foregoing case and exceptions is hereby settled and agreed upon as therein stated, and that the foregoing case contains all of the evidence given and proceedings had upon the trial of this action, and that the same be annexed to the judgment roll in said action and filed in Chenango County Clerk's Office; that either party may use upon the argument of the appeal herein and submit with the case, any of the original exhibits, and that the certificate and order of the Trial Justice who tried this action, and his order directing the filing of the case, and certifying that said case contains all of the evidence given and proceedings had, may be annexed hereto and filed herewith.

Dated January 30th, 1926.

Glenn F. Carter, Attorney for Plaintiff and Respondent. Wm. H. Sullivan, Attorney for Defendant and Appellant

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[fol. 144] In Supreme Court of New York, County of Chenango

[Title omitted]

Order Settling Case

The foregoing contains all of the evidence and other proceedings had upon the trial of this action and exceptions taken by the parties, and the same is hereby settled and ordered filed in Chenango County Clerk's Office.

Dated, January 30th, 1926.

James P. Hill, Justice of the Supreme Court.

[fol. 145] In Supreme Court of New York, Appellate Division, Third Department

257/133

Ernest Caldine, as Administrator of the Goods, Chattels and Credits of Harold E. Caldine, Deceased, Respondent

against

Unadilla Valley Railway Company, Appellant

Opinion

Argued May Term, 1926. Decided September Term, 1926. A. V. S. Cochrane, Presiding Justice.

H. T. Kellogg, C. C. Van Kirk, H. J. Hinman, George McCann, Associate Justices.

An appeal from a judgment in favor of the plaintiff entered in the Chenango County Clerk's Office on the 7th day of December, 1925, and from an order denying the defendant's motion for a new trial.

William H. Sullivan, of Norwich, Attorney for the Appellant.

Glenn F. Carter, of Norwich, Attorney for the Respondent.

[fol. 146] H. T. Kellogg, J.:

The plaintiff is the administrator of the estate of Harold E. Caldine, whose death resulted from a collision at Bridgewater, New York, between a gasoline driven railroad car and a freight train traveling in opposite directions on the tracks of the defendant, the employer of Caldine. Caldine was the conductor of the gasoline car known as "Train No. 2." He had brought the car into Bridgewater station from the north at about 8:10 on the morning of the collision. The freight train, known as "Train 15," was in charge of a conductor named Risley. It came into River Forks, about two miles south of Bridgewater, from the south, at eight

o'clock in the morning. Risley, from the station at River Forks, telephoned Dawson, the station agent at Bridgewater, as follows: "We are ready to leave the Forks. We are coming, hold gas car." Dawson said, "All right, come on." Dawson failed to convey this message to Caldine. A little later Caldine gave the required signal to his motorman to start the gasoline car, and the car started south. Meanwhile, the freight had started north and was approaching Bridgewater. The result was a head-on collision at a point a little south of the Bridgewater station in which Caldine was killed. This action was thereupon brought under the Federal Employers' Liability Act to recover the damages occasioned by the death of Caldine.

Caldine gave the signal to start the gasoline car in direct violation of the printed orders of his employer, the defendant, which provided as follows: "Train No. 2 will pass Train No. 15 in Bridgewater yard," and "Train No. 15 will take turntable siding at Bridgewater to allow Train No. 2 [fol. 147] to pass." These were permanent orders not to be countermanded except by a signed order from the superintendent. No such countermanding order had been given. Caldine had the orders in his possession and had operated the gasoline car thereunder for at least two months. The plaintiff does not dispute that Caldine was negligent. He claims, however, that Dawson was guilty of negligence in not notifying Caldine that the freight was approaching and to hold the gasoline car; that the cause of the collision was compounded of the negligence of Caldine and Dawson; that, therefore, under the Federal Employers' Liability Act the jury were authorized to determine the extent to which the accident was due to Dawson's negligence and to charge the defendant-employer pro tanto for the damages occasioned. We cannot agree that the negligence of Dawson, if any, was a contributing cause. The collision occurred because Caldine, in violation of orders, gave the signal to start the gasoline car. Dawson's negligence, if any, consisted in a failure to caution Caldine not to disobey his written orders and violate his duty. In other words, he failed to prevent Caldine from being negligent and causing the collision. That argument, to the effect that Caldin 's negligence would not have entered in

to cause the collision, if Dawson had warned Caldine, is in itself an admission that Caldine's negligence was the proximate cause thereof. We think that Caldine's death was proximately and solely caused by his own negligence. Therefore, the plaintiff may not have a recovery. Kennedy vs. Davis, Agent, 266 U. S. 147.

The judgment and order should be reversed and the complaint dismissed with costs.

[fol. 148] In Supreme Court of New York, Appellate Division

[Title omitted]

Order of Reversal

The above named, Unadilla Valley Railway Company, defendant in this action, having appealed to the Appellate Division of the Supreme Court, Third Department, from a Judgment of the Supreme Court, entered in the office of [fol. 149] the Clerk of the County of Chenango, on the 7th day of December, 1925, and from an order denying defendant's motion for a new trial, entered in said Clerk's Office, on the 15th day of December, 1925, and the said appeal having been argued by Mr. William H. Sullivan, Attorney for the Appellant, and by Mr. Glenn F. Carter, Attorney for the Respondent, and due deliberation having been had thereon,

It is hereby ordered, that the judgment and order so appealed from be, and the same hereby are, unanimously reversed, with costs, and the complaint is hereby dismissed with costs.

Opinion by H. T. Kellogg, J. All concur.

John S. Herrick, Clerk. (L. S.)

A copy entered the 19th day of Sept., 1926. John S. Herrick, Clerk.

[fol. 150] In Supreme Court of New York, Appellate Division, Third Department

[Title omitted]

Judgment of Reversal

The appeal taken by the defendant in the above entitled action in the judgment entered in said action on the 7th day of September, 1925, in Chenango County Clerk's Office in favor of the plaintiff, Ernest Caldine, as Administrator of the goods, chattels and credits of Harold E. Caldine, deceased, for the sum of twenty-three hundred fifty dollars and twenty-one cents ($2350.21), and against the defendant, Unadilla Valley Railway Company, and from the order denying defendant's motion for a new trial to set aside verdict, and for a new trial, and the said appeal having been duly brought on for a hearing and heard at a term of the Appellate Division of the Supreme Court at the Court House in the City of Albany, N. Y., on the 10th day of May, 1926, and an order of the said Appellate Division having been duly made and entered, unanimously reversing the [fol. 151] said judgment and order, with costs, and dismissing the complaint with costs, all of the Justices concurring therein.

Now, on motion of William H. Sullivan, Attorney for the defendant and appellant, it is hereby

Adjudged, that the said judgment and order be and the same hereby are unanimously reversed with costs, and the complaint in the above entitled action be and the same hereby is dismissed with costs, and that the defendant and appellant, Unadilla Valley Railway Company, recover of the plaintiff and respondent, Ernest Caldine, as Administrator of the goods, chattels and credits of Harold E. Caldine, deceased, the sum of three hundred twenty-three dollars and twenty-five cents ($323.25), the costs and disbursements of the said action, and the said appeal as taxed, and that it have execution therefor.

I. D. Tillman, Dep. Clerk.

Entered in Chenango County Clerk's Office this 13th day of September, 1926, at 10.55 A. M.

I. D. Tillman, Dep. Clerk.

[fol. 152] STATE OF NEW YORK:

SUPREME COURT

[Title omitted]

Court of Appeals

NOTICE OF APPEAL TO COURT OF APPEALS

Please Take Notice that Ernest Caldine, as administrator of the goods, chattels and credits of Harold E. Caldine, deceased, the appellant, appeals to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Third Department, made in this action and entered in the office of the Clerk of said Appellate Division on the 10th day of September, 1926, and entered in the office of the Clerk of the County of Chenango; and appellant appeals from the judgment of reversal herein entered in the office of the Clerk of the County of Chenango on the 13th day of September, 1926, which aforesaid order granted a new trial herein and dismissed the plaintiff's complaint; and this appellant appeals from both said order and judgment; and the above named plaintiff and appellant hereby stipulates and agrees that if the said order of the Appellate Division [fol. 153] be affirmed and the judgment entered thereon in the Chenango County Clerk's Office be affirmed, that in such event, judgment absolute shall be rendered against him in favor of the above named defendant and respondent.

Dated October 30, 1926.

Glenn F. Carter, Attorney for Appellant. Office and Post Office address: 42 No. Broad St., Norwich, N. Y.

To William H. Sullivan, Attorney for Appellant.

To Irving J. Tillman, County Clerk and Clerk of the Supreme Court of Chenango County.

To John S. Herrick, Clerk of the Appellate Division, Third Department.

[fol. 154] Stipulation Waiving Certification

It is hereby stipulated and agreed that the foregoing consists of true and correct copies of the notice of appeal, judgment roll, case and exceptions as settled in the Appellate Division, the notice of appeal to the Court of Appeals, the order of reversal, the judgment of reversal and the whole thereof now on file in the office of the Clerk of the County of Chenango, and certification of same is hereby waived pursuant to Section 170 of the Civil Practice Act.

It is further stipulated that the foregoing be filed in the Court of Appeals as the return thereof.

Dated Norwich, N. Y., February 24, 1927.

Glenn F. Carter, Attorney for Plaintiff-Appellant.
William H. Sullivan, Attorney for Defendant-Respondent.

[fol. 155] Reporter's certificate to opinion omitted in printing.

Judge's certificate to reporter and clerk omitted in printing.

[fol. 156] In Court of Appeals of New York

Ernest Caldine, as Administrator of Harold E. Caldine, Deceased, Appellant,

vs.

Unadilla Valley Railway Company, Respondent

(Decided November 22, 1927)

Appeal from a judgment of the Appellate Division, third department, reversing a judgment entered upon a verdict in favor of plaintiff and dismissing the complaint.

David F. Lee for appellant.
William H. Sullivan for respondent.

OPINION

O'BRIEN, J.:

Plaintiff sued under the Federal Employees' Liability Act to recover damages for the death of his son. The statute imposes liability upon a common carrier engaged in interstate commerce for the death of an employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." Defendant, engaged in interstate commerce, operates trains on a single track from Richfield Junction through Bridgewater and River Forks to New Berlin in this State. Printed orders were issued to all employees: "Train No. 2 will pass Train No. 15 in Bridgewater yard" and "Train No. 15 will take [fol. 157] turntable siding at Bridgewater to allow Train No. 2 to pass." Unless countermanded in writing by the superintendent, these orders were permanent. They were not countermanded. Train No. 2 was a gasoline passenger car of which plaintiff's intestate was conductor. Train No. 15 was a freight train of which Risley was conductor. They collided head-on a short distance south of Bridgewater yard and the conductor of the gasoline car was killed.

Decedent violated the printed permanent orders and was guilty of negligence. Whether the collision was due proximately and solely to his lack of care or whether it resulted in part from the negligence of other employees of defendant is the question before us. Risley, the conductor of the freight train, was accustomed each morning to telephone from River Forks, two miles south of Bridgewater, to Dawson, defendant's agent at Bridgewater, informing him that the freight was on its way and asking him to hold the gas car at Bridgewater. The agent's habit was orally to deliver this message to Caldine, the conductor of the gasoline car. A few minutes prior to the collision, Risley, according to custom, telephoned to Dawson but Dawson omitted to inform Caldine. Dawson asserts that he did tell Dibble, the motorman, but Dibble denies the assertion. Concededly, neither the station agent nor the motorman informed the conductor that the freight was approaching Bridgewater. Nevertheless, the conductor, in violation of [fol. 158] printed orders, signaled the gasoline car to proceed toward River Forks and the motorman, also in viola-

tion of them, obeyed the signal and started the car in plain sight of the station agent. The conductor's negligence cannot be viewed as the sole proximate cause of the collision. The station agent could and should have prevented it. So could the motorman. All three were negligent. If Caldine had not signaled in violation of orders, the collision would not have occurred. Neither would it have happened if Dawson had communicated Risley's message to Caldine. If Dibble had performed his duty and, in the absence of written abrogation of permanent orders, had refused to obey Caldine's signal, the gas car would have remained at Bridgewater yard and allowed the freight to take the turntable siding. Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble.

Contributory negligence by the deceased will not, under the Federal Employees' Liability Act, necessarily prevent recovery by his personal representative. The defense is good only in mitigation of damages. (C., R. I. & P. R. R. Co. v. Ward, 252 U. S. 18.) When several employees of an interstate commerce carrier participate in careless operation of a train and death results to one of them, the statute imposes liability upon the carrier. A trainman killed in a [fol. 159] collision may be found to have been negligent, yet the carrier is not absolved from blame, when the dispatcher also is at fault. (Union Pac. R. R. Co. v. Hadley, 246 U. S. 330.) If other employees in secondary relation to the movement of trains might, by mere possibility, be deemed negligent then actual negligence by the deceased is regarded as the sole and proximate cause of his death. (Davis v. Kennedy, 266 U. S. 147.) Here the negligence of decedent's coemployee Dawson is more than merely possible. It is actual and flagrant. Dibble, the motorman, like *Kennedy*, the engineer, was in direct control of the car's movement and his failure to await the arrival of the freight was the primary cause of the collision. His duty bound him to disregard the conductor's signal until he was certain that the freight had taken the turntable siding. The conductor's duty was merely secondary to that of the

motorman. This, as we understand, conforms with the reasoning in the Kennedy case (supra).

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

Cardozo, Ch. J., Pound, Crane, Andrews and Lehman, JJ., concur; Kellogg, J., not sitting.

Judgment accordingly.

(9834)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 16, 1928

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
FEB 21 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 973

UNADILLA VALLEY RAILWAY COMPANY,
A Corporation, Petitioner,

vs.

ERNEST CALDINE, as Administrator of the Goods, Chattels, and Credits of Harold E. Caldine, Deceased.

PETITION FOR WRIT OF CERTIORARI.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

WIRT HOWE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No.

UNADILLA VALLEY RAILWAY COMPANY,
A CORPORATION, PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF HAROLD E. CALDINE, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, the Unadilla Valley Railway Company, a corporation, respectfully shows unto this Honorable Court:

1. Unadilla Valley Railway Company is a common carrier by railroad, operating a single track road,

1c

with switches, from Bridgewater to New Berlin, in the State of New York. It is engaged in interstate as well as intrastate commerce.

2. On the 25th day of June, 1924, one Caldine, a conductor in its employ, and in charge of one of its trains (R., pp. 48, 57), was killed in a head-on collision between the passenger train of which Caldine was conductor and a freight train of the railroad, at a point near Bridgewater, New York.

3. The administrator of the estate of Caldine brought suit in the Supreme Court of the State of New York against the railroad to recover damages caused by Caldine's death, basing his right of action upon the provision of the Federal Employers' Liability Act (35 Stat. L., 65), (R., pp. 3-8; 17-23).

4. The facts surrounding Caldine's death were briefly as follows: On the day of the accident Caldine was in charge of a railroad train of the company, operated by gas, known as train No. 2, which was due to leave Bridgewater at 8.10 in the morning, going south. One Dibble was the motorman of that train. Train No. 15, a freight train of the railroad company, in charge of one Risley as conductor, coming from the opposite direction, was due to arrive at Bridgewater at 8.00 in the morning.

Caldine, conductor of train No. 2, was under written instructions as follows: "Train No. 2 will pass train No. 15 in Bridgewater yard, and train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass." These were permanent orders, not to be countermanded except by a signed order from the

Superintendent. No such countermanding order had been given (R., pp. 55-56; 146-147).

Shortly before train No. 15 reached Bridgewater, and just as it left a station known as River Forks, about two miles south of Bridgewater, Busley, its conductor, telephoned to the station agent at Bridgewater to hold train No. 2 until train No. 15 arrived at Bridgewater, and immediately proceeded to Bridgewater.

Dawson, the station agent at Bridgewater, claimed to have delivered this message to Dibble, the motorman of train No. 2 (R., p. 82), but this Dibble denied (R., p. 69). Dawson did not deliver the message to Caldine, conductor of No. 2 (R., p. 38).

Without waiting for train No. 15 to arrive at Bridgewater, Caldine gave the regular signal to the motorman to start train No. 2. The motorman started the train (R., p. 80) and it had proceeded but a short distance when it came into a head-on collision with train No. 15. As a result of the collision Caldine was killed.

5. The case was tried to a jury. Under the provisions of the Employers' Liability Act, providing for recovery of damages for death "resulting in whole or in part from the negligence of any of the officers, agents or employees" of a common carrier, the case was submitted to the jury for its determination upon the question of whether Caldine's death was due solely to his own negligence, or whether the negligence of the station agent, Dawson, in failing to deliver to him the message received over the 'phone from the conductor of train No. 15 was a contributing act of negligence (R., p. 180). The jury returned a verdict in favor of

the plaintiff for $2,200 (R., p. 103, 128). Judgment was entered upon the verdict and an appeal therefrom was taken to the Appellate Division. That court reversed the judgment of the trial court, holding that Caldine's death was "proximately and solely caused by his own negligence" (R., p. 145), and basing its opinion and judgment upon the decision of this Court in the case of Kennedy *vs.* Davis, Agent, 266 U. S., 147 (218 App. Div. N. Y., 5; 217 N. Y. Supp., 705).

From this judgment appeal was taken to the court of appeals of the State. That court, after reviewing the case, on November 22, 1927, rendered its opinion and judgment (not yet reported), reversing the judgment of the Appellate Division and affirmed the judgment in favor of the plaintiff in the trial court (R., p. 118). The basis of this holding was that the negligence causing Caldine's death was contributed to by Dawson, the station agent, and also by Dibble, the motorman of train No. 2, in obeying the signal to him to start the train. In support of this opinion and judgment the court of appeals cites the case of Kennedy *vs.* Davis, agent, *supra*.

6. The question here presented is a substantial one and an important one in the law of carriers. The opinion and judgment of the court of appeals virtually makes the carrier an insurer in this case. Not only does the record in the case show a conflict in the decisions of the courts of the State of New York, both supporting their judgments upon the decision of this Court in the case of Kennedy *vs.* Davis, *supra*, but we respectfully submit that the court of appeals has not

properly applied the decision in that case, and the decisions of this Court in other cases; and has upheld a recovery in damages in the face of the fact that Caldine's death was caused proximately and primarily by his starting the train in violation of written instructions, duly promulgated by the carrier governing the operation of the train.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding said court to certify and send to this Court a full and complete transcript of the record and of proceedings of said court in the case entitled "Ernest Caldine, as administrator of the goods, chattels and credits of Harold E. Caldine, deceased, plaintiff, appellant, against Unadilla Valley Railway Company, defendant, respondent," to the end that said cause may be reviewed and determined by this Court, as provided by law; and your petitioner prays that the judgment of the said Court of Appeals of the State of New York in said case may be reversed by this Honorable Court.

And your petitioner will ever pray.

UNADILLA VALLEY RAILWAY COMPANY,

By BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys.

WIRT HOWE,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

H. Prescott Gatley, being first duly sworn, says that he is attorney for the petitioner, Unadilla Valley Railway Company, a corporation; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

H. PRESCOTT GATLEY.

Subscribed and sworn to before me this 17th day of February, 1928.

[SEAL.] NEENAH LAUB,
Notary Public, D. C.

We hereby certify that we have examined the foregoing petition for writ of certiorari, and that, in our opinion, it is well founded in point of law and should be granted by this Honorable Court, and that the petition is not filed for purpose of delay.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No.

UNADILLA VALLEY RAILWAY COMPANY,
A CORPORATION, PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF HAROLD E. CALDINE, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

The facts in this case are practically undisputed. The sole question for determination is: Was the death of Caldine, conductor of train No. 2, caused solely by his own negligence, or was it due in whole or in part to the negligence of Dawson, the station agent, or to

that of Dibble, the motorman of the train, in obeying the signal given by Caldine to start the train, or the negligence of both of them?

Caldine, as conductor of train No. 2, was in entire charge of the train; the duty of giving orders for the movement of the train belonged to him; the engineer has no right to move the train except upon the orders from the conductor (R., pp. 48, 68, 71).

In this situation, Caldine, as conductor, was under written instructions as follows: "Train No. 2 will pass train No. 15 in Bridgewater yard, and train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass."

In violation of these instructions, Caldine gave to the motorman the signal to move the train. The motorman obeyed the order and started the train. It had gone but a very short distance when the collision occurred. It is difficult to imagine a more palpable and flagrant act of negligence than this act of Caldine's. The motorman in starting the train in obedience to Caldine's signal to him to do so, clearly performed his *duty*, hence there was no negligence in so doing. Surely Caldine ought not to be heard to complain because of this performance of *duty* by the motorman, pursuant to his, Caldine's, express orders. The Court of Appeals, however, holds as matter of law, that the motorman of the train should not have obeyed this signal, and his failure to refuse to obey the starting signal was a breach of duty on his part, which constituted negligence contributing proximately to Caldine's death. We submit this holding is erroneous

and based upon fallacious reasoning, and is a most dangerous one, for, if an engineer of a train can, at will, violate the signal of a conductor in charge of the movement of a train, as Caldine was in this case (R., pp. 48, 58, 71), the safety of employees of the carrier, and the safety of the traveling public as well, would be jeopardized to the greatest degree.

The failure of the station agent to deliver the message to Caldine cannot, we submit, constitute negligence, for had he done so it would have amounted to nothing more than saying to Caldine "obey your written instructions!"

Even assuming the acts of Dawson, the station agent, and of Dibble, the motorman, to be negligent, we submit that they did not contribute in a proximate way to Caldine's death.

If the death of Caldine was caused by his own negligence, no recovery could be had. Was his negligence the primary, proximate cause of his death? The answer seems plain, for it was his act, done in violation of written instructions, that set in motion the instrument of death, and from the time that act was performed by him to the time of the collision, resulting in his death, there was no intervening negligent act on the part of any of the "officers, agents or employees" of the company that contributed in any degree to the accident.

As said by Mr. Justice McKenna in speaking for this Court in the case of Great Northern Railroad Company vs. Miles, 240 U. S., 444, 448:

> "In the present case there was nothing to extenuate Miles' negligence; there was nothing to

> confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent."

We think the Appellate Division was correct in holding that no recovery could be had in this case, and in basing that holding upon the decision of this Court in the case of Kennedy's Administratrix *vs.* Davis, Agent, 266 U. S., 147 (218 App. Div. N. Y., 5; 217 N. Y. Supp., 705; R., p. 1464). That was a collision case, and recovery was sought under the provisions of the Employers' Liability Act, for the alleged negligent death of the engineer of one of the trains. The accident occurred near a point known as Shops, which was two and one-half miles west of Nashville, Tennessee, when trains No. 1 and No. 4 came into collision. The tracks were double from Nashville to Shops, but after that the track was single. No. 1, bound for Nashville, had the right of way, and the crew of No. 4, bound westward, had instructions never to pass Shops unless they knew in fact that No. 1 had passed it. Kennedy was the engineer of No. 4. The conductor had told him that the train was crowded and had asked him to look out for No. 1, which Kennedy agreed to do. He ran his train on beyond Shops, however, and the collision occurred.

Plaintiff obtained a judgment, which was sustained by the Supreme Court of Tennessee, on the ground that the other members of the crew, as well as the engineer, were bound to look out for the approaching

train, and that their negligence contributed as a proximate cause to the engineer's death.

In reversing the judgment, this Court, speaking through Mr. Justice Holmes, says:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act, as required, on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more." (Frese vs. Chicago, Burlington & Q. R. R. Co., 263 U. S., 1, 3.)

It needs no argument to apply the holding in the Kennedy case to the undisputed facts in the instant case.

To hold the company liable in damages for Caldine's death is tantamount to holding that the company, as a carrier, was an insurer of his safety. This was never contemplated by the provisions of the Employers' Liability Act.

> "While the Employers' Liability Act was manifestly intended to modify the law as it formerly existed, so as to materially benefit those who might be injured in the future by abolishing the harsh rule known as the 'Fellow Servant Doctrine,' yet it cannot be reasonably insisted that it was the purpose of the Act to afford relief where one's injury is due solely to

his own reckless and indifferent conduct." (Virginian Ry. Co. vs. Linkous, 230 Fed., 88, 93.)

Conclusion.

It is respectfully submitted:

1. The Court of Appeals of New York, by its opinion and judgment in this case, extends beyond reason the provisions of the Employers' Liability Act, and that in so doing, misconstrues and misapplies the fundamental principles underlying the law as determined and announced by this Court.

2. The judgment complained of is erroneous and in violation of the rights of petitioner, and should be corrected.

3. For the purpose of reviewing said judgment and correcting the error therein, a writ of certiorari should issue as prayed.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

WIRT HOWE,
Of Counsel.

Office Supreme Court, U. S.
FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 73

UNADILLA VALLEY RAILWAY COMPANY,
PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS, AND CREDITS OF HAROLD E. CALDINE, DECEASED.

BRIEF ON BEHALF OF PETITIONER.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Petitioner.

WIRT HOWE,
Of Counsel.

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BRIEF ON BEHALF OF PETITIONER.

Statement of the Case.

The case is here on writ of certiorari to the Court of Appeals of the State of New York.

The facts of the case are as follows:

Unadilla Valley Railway Company is a common carrier by railroad, operating a single-track road, with switches, from Bridgewater to New Berlin, in the State

of New York. It is engaged in interstate as well as intrastate commerce.

On the 25th day of June, 1924, one Caldine, a conductor in its employ, and in charge of one of its trains (R., pp. 35, 44, 56), was killed in a head-on collision between the passenger train of which Caldine was conductor and a freight train of the railroad, at a point near Bridgewater, New York.

The administrator of the estate of Caldine brought suit in the Supreme Court of the State of New York against the railroad to recover damages caused by Caldine's death, basing his right of action upon the provision of the Federal Employers' Liability Act (35 Stat. L., 65), (R., pp. 4, 8, 12, 17).

The facts surrounding Caldine's death were briefly as follows: On the day of the accident Caldine was in charge of a railroad train of the company, operated by gas, known as train No. 2, which was due to leave Bridgewater at 8:10 in the morning, going south. One Dibble was the motorman of that train. Train No. 15, a freight train of the railroad company, in charge of one Risley as conductor, coming from the opposite direction, was due to arrive at Bridgewater at 8:00 in the morning.

Caldine, conductor of train No. 2, was under written instructions as follows: "Train No. 2 will pass train No. 15 in Bridgewater yard, and train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass." These were permanent orders, not to be countermanded except by a signed order from the superintendent. The record shows this had been directly

brought to Caldine's personal notice by the general manager (R., pp. 79-80). No such countermanding order had been given (R., pp. 41, 42, 114).

Shortly before train No. 15 reached Bridgewater, and just as it left a station known as River Forks, about two miles south of Bridgewater, Risley, its conductor, telephoned to the station agent at Bridgewater to hold train No. 2 until train No. 15 arrived at Bridgewater, and immediately proceeded to Bridgewater.

Dawson, the station agent at Bridgewater, claimed to have delivered this message to Dibble, the motorman of train No. 2 (R., p. 39), but this Dibble denied (R., p. 54). Dawson did not deliver the message to Caldine, conductor of No. 2 (R., p. 39).

Without waiting for train No. 15 to arrive at Bridgewater, Caldine gave the regular signal to the motorman to start train No. 2. The motorman started the train (R., p. 45) and it had proceeded but a short distance when it came into a head-on collision with train No. 15. As a result of the collision Caldine was killed.

The case was tried to a jury. Under the provisions of the Employers' Liability Act, providing for recovery of damages for death "resulting in whole or in part from the negligence of any of the officers, agents or employees" of a common carrier, the case was submitted to the jury for its determination upon the question of whether Caldine's death was due solely to his own negligence, or whether the negligence of the station agent, Dawson, in failing to deliver to him the message received over the phone from the conductor of train No. 15 was a contributing act of negligence

(R., p. 97). The jury returned a verdict in favor of the plaintiff for $2,200 (R., p. 103). Judgment was entered upon the verdict and an appeal therefrom was taken to the Appellate Division. That court reversed the judgment of the trial court, holding that Caldine's death was "proximately and solely caused by his own negligence" (R., p. 115), and basing its opinion and judgment upon the decision of this Court in the case of Kennedy *vs.* Davis, Agent, 266 U. S., 147 (218 App. Div. N. Y., 5; 217 N. Y. Supp., 705).

From this judgment appeal was taken to the court of appeals of the State. That court, after reviewing the case, on November 22, 1927, rendered its opinion and judgment, reversing the judgment of the Appellate Division and affirmed the judgment in favor of the plaintiff in the trial court (246 N. Y., 365; R., p. 119). The basis of this holding was that the negligence causing Caldine's death was contributed to by Dawson, the station agent, and also by Dibble, the motorman of train No. 2, in obeying the signal to him to start the train. In support of this opinion and judgment the court of appeals cites the case of Kennedy *vs.* Davis, agent, *supra*.

ARGUMENT.

The facts in this case are practically undisputed. The sole question for determination is: Was the death of Caldine, conductor of train No. 2, caused solely by his own negligence, or was it due in whole or in part to the negligence of Dawson, the station agent, or to that of Dibble, the motorman of the train, in obeying

the signal given by Caldine to start the train, or the negligence of both of them?

Caldine, a conductor of train No. 2, was in entire charge of the train; the sole duty of giving orders for the movement of the train belonged to him; the engineer has no right to move the train except upon the orders from the conductor (R., pp. 35, 44, 56).

In this situation, Caldine, as conductor, was under written instructions as follows: "Train No. 2 will pass train No. 15 in Bridgewater yard, and train No. 15 will take turntable siding at Bridgewater to allow train No. 2 to pass."

In violation of these instructions, Caldine gave to the motorman the signal to move the train. The motorman obeyed the order and started the train. It had gone but a very short distance when the collision occurred. It is difficult to imagine a more palpable and flagrant act of negligence than this act of Caldine's. The motorman in starting the train in obedience to Caldine's signal to him to do so, clearly performed his *duty*, hence there was no negligence in so doing. Surely Caldine ought not to be heard to complain because of this performance of *duty* by the motorman, pursuant to his, Caldine's, express orders. The Court of Appeals, however, holds as matter of law, that the motorman of the train should not have obeyed this signal, and his failure to refuse to obey the starting signal was a breach of duty on his part, which constituted negligence contributing proximately to Caldine's death. We submit this holding is erroneous and based upon fallacious reasoning, and is a most

dangerous one, for, if an engineer of a train can, at will, violate the signal of a conductor in charge of the movement of a train, as Caldine was in this case (R., pp. 35, 44, 56), the safety of employees of the carrier, and the safety of the traveling public as well, would be jeopardized to the greatest degree.

The failure of the station agent to deliver the message to Caldine cannot, we submit, constitute negligence.

It is contended by respondent that it had been the custom of the conductor of the freight train, when that train was late, to telephone to the station agent at Bridgewater and inform him of that fact. This the conductor, called as a witness for the plaintiff, testified was done for safety, but he wasn't supposed to do it (R., p. 37). Dawson, the station agent, testifying as a witness for the plaintiff, testified that such messages were not orders; that orders were received in writing, and when so received were delivered both to the conductor and motorman of the train (R., pp. 51, 52); that prior to this time train No. 2 never went down and met train No. 15 at any other point without an order, and that he could only find in his records two such orders (R., pp. 51, 48).

Having received no orders regarding the movement of the trains, Dawson, the station agent, was under no duty with reference thereto, and, in the absence of a breach of duty, there could be no negligence on his part. The mere failure by him to deliver to Caldine the verbal message received by him could not in law constitute negligence, for, had he done so, it would

have amounted to nothing more than saying to Caldine "obey your written instructions:"

Even assuming the acts of Dawson, the station agent, and of Dibble, the motorman, to be negligent, we submit that they did not contribute in a proximate way to Caldine's death.

If the death of Caldine was caused by his own negligence, no recovery could be had. Was his negligence the primary, proximate cause of his death? The answer seems plain, for it was his act, done in violation of written instructions, that set in motion the instrument of death, and from the time that act was performed by him to the time of the collision, resulting in his death, there was no intervening negligent act on the part of any of the "officers, agents or employees" of the company that contributed in any degree to the accident.

As said by Mr. Justice McKenna in speaking for this Court in the case of Great Northern Railroad Company *vs.* Miles, 240 U. S., 444, 448:

> "In the present case there was nothing to extenuate Miles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent."

We think the Appellate Division was correct in holding that no recovery could be had in this case, and in basing that holding upon the decision of this Court in the case of Kennedy's Administratrix *vs.* Davis, Agent, 266 U. S., 147 (218 App. Div. N. Y., 5; 217 N. Y.

Supp., 705; R., p. 146). That was a collision case, and recovery was sought under the provisions of the Employers' Liability Act, for the alleged negligent death of the engineer of one of the trains. The accident occurred near a point known as Shops, which was two and one-half miles west of Nashville, Tennessee, when trains No. 1 and No. 4 came into collision. The tracks were double from Nashville to Shops, but after that the track was single. No. 1, bound for Nashville, had the right of way, and the crew of No. 4, bound westward, had instructions never to pass Shops unless they knew in fact that No. 1 had passed it. Kennedy was the engineer of No. 4. The conductor had told him that the train was crowded and had asked him to look out for No. 1, which Kennedy agreed to do. He ran his train on beyond Shops, however, and the collision occurred.

Plaintiff obtained a judgment, which was sustained by the Supreme Court of Tennessee, on the ground that the other members of the crew, as well as the engineer, were bound to look out for the approaching train, and that their negligence contributed as a proximate cause to the engineer's death.

In reversing the judgment, this Court, speaking through Mr. Justice Holmes, says:

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act, as re-

> quired, on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more.' (Frese *vs.* Chicago, Burlington & Q. R. R. Co., 263 U. S., 1, 3.)

It needs no argument to apply the holding in the Kennedy case to the undisputed facts in the instant case.

To hold the company liable in damages for Caldine's death is tantamount to holding that the company, as a carrier, was an insurer of his safety. This was never contemplated by the provisions of the Employers' Liability Act.

> "While the Employers' Liability Act was manifestly intended to modify the law as it formerly existed, so as to materially benefit those who might be injured in the future by abolishing the harsh rule known as the 'Fellow Servant Doctrine,' yet it cannot be reasonably insisted that it was the purpose of the Act to afford relief where one's injury is due solely to his own reckless and indifferent conduct." (Virginian Ry. Co. *vs.* Linkous, 230 Fed., 88, 93.)

Conclusions.

It is respectfully submitted:

1. The Court of Appeals of New York, by its opinion and judgment in this case, extends beyond reason the provisions of the Employers' Liability Act, and in so doing, misconstrues and misapplies the funda-

mental principles underlying the law as determined and announced by this Court.

2. The judgment complained of is erroneous and in violation of the rights of petitioner, and should be reversed.

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UNADILLA VALLEY RAILWAY COMPANY,
PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HAROLD E. CALDINE, DECEASED.

Brief on Behalf of Respondent.

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UNADILLA VALLEY RAILWAY COMPANY,
PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HAROLD E. CALDINE, DECEASED.

BRIEF ON BEHALF OF RESPONDENT.

Statement of the Case.

The case is here on writ of certiorari to the Court of Appeals of the State of New York.

Respondent herein sued the petitioner, a common carrier engaged in interstate commerce, under the Federal Employers' Liability Act, to recover damages for the death of his son, Harold Caldine (R., pp. 3-8; R., pp. 12-17). The act imposes liability upon a common carrier engaged in interstate commerce for the death of any employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." The highest court of the State of New York, viz, the Court of Appeals, reversed the Appellate Division of the State of New York and reaffirmed a verdict of the Trial Court for the respondent in the sum of $2,200 (R., pp. 105, 118-121). The opinion of the Court of Appeals is reported in 246 N. Y. at page 365.

Most of the facts connected with the case have been presented in the brief of the petitioner and respondent will only briefly refer to these facts. However, there are certain facts connected with the case not presented by the petitioner and these facts will be hereinafter set forth.

Petitioner at the time of the occurrence was engaged in interstate commerce operating trains on a single track from Richfield Junction through Bridgewater and River Forks to New Berlin, New York State (R., p. 22). On June 25, 1924, respondent's intestate, Caldine, a conductor in the employ of petitioner, was killed in a head-on collision between the passenger train, of which Caldine was conductor, and a freight train of the railroad at a point near Bridgewater, N. Y. (R., p. 28). On the day of the occurrence Caldine was conductor of a railroad train of the company operated by gas, known as Train No. 2, which was due to leave Bridgewater at 8:10 in the morning, going south; one Dibble was motorman of that train. Train No. 2 had been running for about two months (R., pp. 54, 77, 78). Train No. 15, a freight train of the railroad company, in charge of one Risley, as conductor, coming from the opposite direction, was due to arrive at Bridgewater at eight o'clock in the morning (R., pp. 36, 37).

At the time Caldine was killed the petitioning railroad company had no book of rules (R., pp. 35, 36), had no block signal system on it or at the yards, did not have any semaphore signal system (R., p. 36), had no telegraph system (R., p. 23), and their only method of communication along the railroad line for safety was the telephone (R., p. 23). The road was practically under the supervision of the dispatcher.

Prior to the time of the occurrence it had been the custom of the freight conductor, Risley, to inform Dawson, petitioner's operator at Bridgewater, when he left River

Forks and it had been the custom of Dawson to tell Caldine while his car was in Bridgewater when the train was going north, as to the whereabouts of the freight train, and if it was on the right of way of the train of Caldine (R., pp. 27, 50). This is shown by the following testimony of the petitioner's operator and dispatcher, Dawson:

> "Q. Isn't it a fact that a number of times this man, Risley, phoned to you, as station agent and operator, that he was coming, to hold gas car? A. Yes.
>
> "Q. Hasn't he done that before that time? A. Yes, several times.
>
> "Q. It has been the custom of yourself to go out and tell them they were coming? A. Yes.
>
> "Q. And that was the custom while the train was on there? A. Yes.
>
> "Q. And you told Caldine, didn't you? A. Yes.
>
> "Q. But this morning you didn't tell him? A. No" (R., p. 50).

On the day in question the conductor of the freight train telephoned Dawson at Bridgewater for safety's sake and informed him that the freight train was on its way and asked him to hold the gas car at Bridgewater (R., pp. 27, 28, 39). Notwithstanding this information Dawson never said one word to the conductor, Caldine. Dawson claims that he did tell the motorman, Dibble (R., pp. 39, 40, 53). Dibble denies this (R., p. 54). Caldine, not receiving any information on the morning in question, felt secure in leaving Bridgewater station and signalling the train to go ahead. The collision occurred shortly after he had left the station (R., p. 28).

It will be noted by the Court that most of the witnesses in the case at bar were employees of the petitioner so that the respondent was in the position of proving most of his case by unwilling witnesses.

ARGUMENT.

As presented by the petitioner in its brief submitted herein the real question for determination is: Was the death of Harold Caldine, conductor of Train No. 2, caused solely by his own negligence or was it due in whole or in part to the negligence of Dawson, the station agent, or to that of Dibble, the motorman, or to the negligence of both of them? It is claimed by the petitioner that the death of Caldine was due solely to his own negligence.

It is the contention of the respondent that under the facts of the case at bar it cannot possibly be said as a matter of law that Caldine's negligence, if he was at all negligent, was the sole and proximate cause of the collision which caused his death. The facts show conclusively that the negligence of employees, other than Caldine, was in whole or in part directly and proximately responsible for the occurrence which caused his death. For this reason there is no merit in the position of the petitioner and the judgment complained of should be affirmed.

The petitioner maintains that the collision and death of Caldine were caused solely by the negligent act of Caldine in violating a supposed rule of the petitioner by signalling Train No. 2 to go forward without waiting for the freight train at Bridgewater. Petitioner claims that a statement on the time-table of the company that said freight train and Caldine's train were to pass at Bridgewater was what they called a positive order. This rule petitioner contended could not be countermanded except by written order signed by the superintendent (R., pp. 77, 78). Petitioner's railroad had no telegraph system, so how could a message be given except by telephone (R., p. 23).

If such notice on the time-table can possibly be

considered a positive order such rule was entirely abrogated by the custom and conduct of the employees in the use of the telephone and continued acquiescence by the railroad company in such custom and conduct and knowledge thereof. The rule stated in the time-table was habitually disregarded and its disregard was such that the company in the exercise of reasonable care could discover its customary disregard for they well knew the highly inadequate protection the employees had and must have known about the only way of keeping in touch with each other along the railroad line was by telephone.

There is no doubt that a railroad company, having authority to establish rules for the government of employees, may waive obedience to the rules, or may entirely acquiesce in a disregard of the rules so continuously as to justify the inference that they are no longer in force and that obedience is not required. This was the fact in the case at bar. The supposed rule had been abrogated and Caldine was not negligent in violating an abrogated rule.

But even if we assume that Caldine was negligent in the violation of a positive rule in signalling the car to go forward it cannot be reasonably and logically said that his negligence was the sole and proximate cause of the accident. As was said by the Court of Appeals of the State of New York, in reaffirming the verdict of the Trial Court in the case at bar (246 N. Y. 365):

> "Nevertheless, the conductor, in violation of printed orders, signaled the gasoline car to proceed toward River Forks and the motorman, also in violation of them, obeyed the signal and started the car in plain sight of the station agent. The conductor's negligence cannot be viewed as the sole proximate cause of the collision. The station agent could and should have prevented it. So could the motorman. All three were negligent. If Caldine had not signaled in violation of orders, the collision would not have occurred. Neither would it have

> happened if Dawson had communicated Risley's message to Caldine. If Dibble had performed his duty and, in the absence of written abrogation of permanent orders, had refused to obey Caldine's signal, the gas car would have remained at Bridgewater yard and allowed the freight to take the turntable siding. Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble. * * * If other employees in secondary relation to the movement of trains might, by mere possibility, be deemed negligent, then actual negligence by the deceased is regarded as the sole and proximate cause of his death (*Davis vs. Kennedy*, 266 U. S. 147). Here the negligence of decedent's co-employee, Dawson, is more than merely possible. It is actual and flagrant. Dibble, the motorman, like Kennedy, the engineer, was in direct control of the car's movement and his failure to await the arrival of the freight was the primary cause of the collision. His duty bound him to disregard the conductor's signal until he was certain that the freight had taken the turntable siding. The conductor's duty was merely secondary to that of the motorman. This, as we understand, conforms with the reasoning in the *Kennedy* case (*supra*)" (R., pp. 118-121).

It is the contention of the respondent that the collision and resulting death of Caldine was caused not alone by any negligence of Caldine, if said Caldine could be considered negligent, but was caused in whole or in part by the negligence of Dawson and the negligence of Dibble, the motorman. Dawson did not give Risley's telephone message to Caldine. Certainly if this information had been given to him the collision would not have occurred. Instead of doing so Dawson sat on a bench outside of the station at Bridgewater chatting with some other men instead of attending to his business at the time in question (R., pp. 62, 63). Dibble was negligent in that in the face

of positive orders, if there were such orders, he started the car, knowing that a collision was inevitable. Can it be said, as a matter of law, that Dawson, under the circumstances, owed no duty to inform Caldine of the telephone message from Risley? The petitioner seeks to hide the actual and flagrant negligence of Dawson by stating he was not negligent and asserting that if he had given Caldine the message it would have amounted to nothing more than saying, "Obey your written instructions." Respondent submits that it would have amounted to a great deal more. It would have prevented the collision. Dawson sat idly by while the train left the station, knowing that a collision was inevitable (R., pp. 62, 63). Under the circumstances he owed the legal, human duty to give the information which would have avoided this terrible occurrence.

The petitioner contends that the Court of Appeals was in error in holding that the motorman of the train should not have obeyed the signal, stating that the holding is erroneous and is a most dangerous one, for if the engineer of a train can at will violate the signal of a conductor the safety of the employees of the carrier and the safety of the travelling public as well would be jeopardized to the highest degree. As a matter of fact, the Court of Appeals of New York did not hold that the engineer of a train can at will violate the signals of a conductor, but properly and justly held that the engineer is in direct control of the train's movement and if the engineer, as well as the conductor, is under definite rules of the company the engineer owes a legal duty to adhere to the rules and would be guilty of negligence in violating them. It certainly would be a dangerous and illogical rule to hold that the motorman should always follow the signals of a conductor even though it was in violation of a rule and even though he knew that following such signals would place the train in inevitable danger.

There is no merit in the contention of the petitioner that the Appellate Division of the State of New York was correct in holding that no recovery could be had in this case and in basing that holding upon the decision of this Court in the case of *Kennedy vs. Davis*, 266 U. S. 147 (218 App. Div. N. Y. 5, 217 N. Y. S. 705) (R., p. 113). The Court of Appeals has properly applied the *Kennedy* case and was justified in reversing the decision of the Appellate Division (246 N. Y. 365). The *Kennedy* case, in so far as applicable to Caldine's negligence, is distinguishable from the case at bar in many respects. In that case the engineer, Kennedy, was killed and the action was brought against the railroad company on the ground that possibly some of the other members of the crew, secondary in command, were bound to look out for approaching trains coming in an opposite direction, and that their negligence contributed in a proximate way to the death of the engineer. In that case the facts were such that the other employees' negligence was secondary to that of the plaintiff's. It could hardly be contended in the case at bar that Dawson's negligence or Dibble's negligence was secondary to anyone. Dawson's negligence was in fact primary for, as station agent, he was conclusively presumed to know the schedule of all the trains on that line. Dibble's negligence was also primary and proximate as stated in the opinion of the Court of Appeals of the State of New York. The *Kennedy* case was decided upon the case of *Freese vs. Chicago, Burlington and Ohio R. R. Co.*, 263 U. S. 1, and upon the fact that even if those in secondary relation did their duty and performed every act they should have done, even then the accident might have occurred. In the *Kennedy* case no one was negligent other than Kennedy himself, whereas in the case at bar certainly the negligence of Dawson or Dibble or the negligence of both of them was in part at least a proximate cause of the collision. In the *Kennedy* case the train coming from the opposite direction had the right of way.

Whereas, in the instant case the passenger car upon which Caldine was conductor had the right of way over the freight train which was coming in the opposite direction (R., p. 55). In the *Kennedy* case plaintiff was told of the car coming, whereas in the instant case Caldine was not told.

In the case at bar it is the contention of respondent that respondent's intestate was free from contributory negligence by reason of the custom which had grown up of the operator, Dawson, at Bridgewater notifying him when the freight train was coming north on the same track on which he was going south; however, if this Court feels, as did the Court of Appeals of the State of New York, that Caldine was negligent, the most that can be said is that his negligence was only in part a proximate cause of the collision in question and under the statute this is not a bar to recovery but only goes to diminish the damages in proportion to the contributory negligence of respondent's intestate.

> *Compiled Statutes of the United States*, Vol. 8, p. 9423, Sec. 8659.

Contributory negligence does not bar a recovery under the Federal Employers' Liability Act.

> *Union Pac. R. R. Co. vs. Hadley*, 246 U. S. 330.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the plaintiff's intestate in that case was a brakeman who was killed while in the caboose of his train. His duty, by positive railroad rule, required him to go back and give certain signals to trains in the rear thereof when his own train was stopped on the tracks. The brakeman failed to go back and flag a train coming from the rear of his train, but stayed in the caboose, and a train coming from the rear ran into the caboose and killed the brakeman, plaintiff's intestate, but this Court held that his negligence was not the only proximate cause

of his death, for it appeared in that case that the train which ran into his train and killed him was at the place in question by reason of the negligent operation of trains by a dispatcher and station agent of the railroad company in routing trains.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the train which ran into plaintiff's intestate's train in that case would not have been at the place of collision had the dispatcher done his duty, and in the case at bar had the dispatcher and operator, Dawson, done his duty and notified respondent's intestate that the Freight Train No. 15 was coming, then respondent's intestate would not have been at the place in question.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, this Court held that Hadley, the brakeman, was negligent in not going back and notifying trains coming from the rear after his train had been stopped, and, although this was actual proof of negligence on his part, the Court held that it could not be declared as a matter of law that the proximate cause of the brakeman's death was his contributory negligence and that, under the Federal Employers' Liability Act, it did result, in part, in the negligence of an employee of the railroad company.

Hence, under the ruling in the *Hadley* case, *supra*, the instant case certainly presented a question of fact for the jury upon the proposition of the negligence of the petitioner's other employees and the contributory negligence of respondent's intestate.

This Court, in the case of *Chicago, Rock Island & Pacific Railroad Company vs. Ward*, 252 U. S. 18, sets forth the provision that under the Federal Employers' Liability Act, contributory negligence is not a defense and only goes in mitigation of damages.

Whether under the facts of this case Caldine's negligence was the sole cause of his injury or whether the

negligence of the other employees contributed in whole or in part to the cause was a question of fact for the jury and was properly determined. The Appellate Division of the State of N. Y., with all due and kind respect to them, erred when they held that the deceased was proximately and solely to blame for his own death, for as said by Judge Knappen, speaking for the Federal Circuit Court of Appeals in the *Pennsylvania Co. vs. Cole*, 214 Fed. 948: "But the Employers' Liability Act expressly abrogates the common-law rule under which action was barred by negligence of the plaintiff proximately contributing to the accident and substitutes therefor the rule of comparative negligence. Under this act no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery." As was stated in *Grand Trunk W. Railway vs. Lindsay*, 201 Fed. 836, 844, in passing upon the contention that the plaintiff's action was barred by his proximate negligence the Circuit Court of Appeals for the 7th Circuit said: "It is only when the plaintiff's act is the sole cause, when defendant's act is no part of the causation, that the defendant is free from liability under the act." This ruling was held correct by this Court in *Grand Trunk W. Railway Co. vs. Lindsay*, 233 U. S. 42, at page 47.

The Federal Statute would be nullified if it was held, under the facts of the instant case, that the acts of respondent's intestate were the sole proximate cause of his injury and death.

Conclusion.

It is respectfully submitted:

1. The Court of Appeals of New York by its opinion and judgment in this case has reasonably and properly applied the provisions of the Employers' Liability Act

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. [redacted] 73

UNADILLA VALLEY RAILWAY COMPANY,
A CORPORATION, PETITIONER,

vs.

ERNEST CALDINE, AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF HAROLD E. CALDINE, DECEASED, RESPONDENT.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

THOMAS B. KATTELL,
Attorney for ~~Petitioner~~ Respondent.

DAVID F. LEE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927,

No. 789.

UNADILLA VALLEY RAILWAY COMPANY, a Corporation,
Petitioner,
vs.
ERNEST CALDINE, as Administrator of the Goods, Chattels and Credits of Harold E. Caldine, deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent herein sued the petitioner, a common carrier engaged in interstate commerce, under the Federal Employers' Liability Act, to recover damages for the death of his son, Harold Caldine (R., pp. 3-8, ff. 4-8; R., pp. 12-17, ff. 17-23). The act imposes liability upon a common carrier engaged in interstate commerce for the death of any employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." The highest court of the State of New York, viz, the Court of Appeals, reversed the Appellate Division of the State of New York and reaffirmed a verdict of the Trial Court for the respondent in

the sum of $2,200 (R., pp. 118-121, f. 156). The petitioner now seeks to review the decision of the state court by asking that a writ of certiorari be issued out of this Honorable Court directed to the Court of Appeals of the State of New York.

As presented by the petitioner in the petition and brief submitted on the application for the writ of certiorari the real question for determination is: Was the death of Harold Caldine, conductor of Train No. 2, due solely to his own negligence or was it due in whole or in part to the negligence of Dawson, the station agent, or to that of Dibble, the motorman, or to the negligence of both of them? It is claimed by the petitioner that the death of Caldine was due solely to his own negligence.

Opposing the petition herein it is the contention of the respondent that under the facts of the case it cannot possibly be said as a matter of law that Caldine's negligence, if he was at all negligent, was the sole and proximate cause of the collision which caused his death. The facts show conclusively that the negligence of employees, other than Caldine, was in whole or in part directly and proximately responsible for the occurrence which caused his death. For this reason there is no merit in the petition for a writ of certiorari herein and the writ should not be granted.

Most of the facts connected with the case have been presented in the petition and brief of the petitioner and respondent will only briefly refer to these facts. However, there are certain facts connected with the case not presented by the petitioner

and these facts will be hereinafter more fully presented.

Petitioner at the time of the occurrence was engaged in interstate commerce operating trains on a single track from Richfield Junction through Bridgewater and River Forks to New Berlin, New York State (R., p. 22, f. 32). On June 25, 1924, respondent's intestate, Caldine, a conductor in the employ of petitioner, was killed in a head-on collision between the passenger train, of which Caldine was conductor, and a freight train of the railroad at a point near Bridgewater, N. Y. (R., p. 28, f. 40). On the day of the occurrence Caldine was conductor of a railroad train of the company operated by gas known as Train No. 2, which was due to leave Bridgewater at 8:10 in the morning, going south; one Dibble was motorman of that train. Train No. 15, a freight train of the railroad company in charge of one Risley, as conductor, coming from the opposite direction, was due to arrive at Bridgewater at eight o'clock in the morning (R., pp. 36, 37, f. 49).

At the time Caldine was killed the petitioning railroad company had no book of rules (R., pp. 35, 36, f. 48), had no block signal system on it or at the yards, did not have any semaphore signal system (R., p. 36, f. 49), had no telegraph system (R., p. 23, f. 34), and their only method of communication along the railroad line for safety was the telephone (R., p. 23, f. 34). The road was practically under the supervision of the dispatcher.

Prior to the time of the occurrence it had been

the custom of the freight conductor, Risley, to inform Dawson, petitioner's operator at Bridgewater, when he left River Forks and it had been the custom of Dawson to tell Caldine while his car was in Bridgewater when the train was going north as to the whereabouts of the freight train, and if it was on the right of way of the train of Caldine (R., p. 50, ff. 64, 65). On the day in question the conductor of the freight train telephoned Dawson at Bridgewater for safety's sake and informed him that the freight train was on its way and asked him to hold the gas car at Bridgewater (R., p. 39, ff. 52, 53). Notwithstanding this information Dawson never said one word to the conductor, Caldine. Dawson claims that he did tell the motorman, Dibble (R., pp. 39, 40, f. 53). Dibble denies this (R., p. 54, f. 69). Caldine not receiving any information on the morning in question felt secure in leaving Bridgewater station and signalling the train to go ahead. The collision occurred shortly after he had left the station (R., p. 28, f. 40).

It is the contention of the petitioner that the collision and death of Caldine were caused solely by the negligent act of Caldine in violating a supposed rule of the petitioner by signalling Train No. 2 to go forward without waiting for the freight train at Bridgewater. Petitioner claims that a statement on the time-table of the company that said freight train and Caldine's train were to pass at Bridgewater was what they called a positive order. This rule petitioner contended could not be countermanded except by written order signed by the superintendent (R., pp. 77, 78, ff. 95, 96). Petitioner's

railroad had no telegraph system so how could a message be given except by telephone (R., p. 23, f. 34).

If such notice on the time-table can possibly be considered a positive order such rule was entirely abrogated by the custom and conduct of the employees in the use of the telephone and continued acquiescence by the railroad company in such custom and conduct and knowledge thereof. The rule stated in the time-table was habitually disregarded and its disregard was such that the company in the exercise of reasonable care could discover its customary disregard for they well knew the highly inadequate protection the employees had and must have known about the only way of keeping in touch with each other along the railroad line was by telephone.

The railroad company is conclusively presumed to know the whereabouts of all its own trains and the defendant's negligence was the proximate cause of the death of the intestate even if Caldine did violate a rule.

Louisville & R. R. Co. vs. Heck, 151 Ind. 292.

Private rules adopted for the regulation and government of trains and trainmen do not stand upon the same footing as statutes and municipal ordinances, and compliance therewith does not necessarily constitute reasonable care, nor does a violation thereof necessarily constitute negligence as a matter of law.

Smithson vs. Chicago Great Western Railway Co., 71 Minn. 216.

Jennins vs. Phila. B. & W. Railway Co., 29 App. cases (D. C.) 219.
Phillips vs. Chicago, Milwaukee & St. Paul Railway Co., 64 Wis. 475.

If the railroad company suffered habitual disregard of the rule, its violation would not be negligence.

Hayes vs. Bush & Denslow Mfg. Co., 41 Hun 407.
Pocahontas Consol. Collieries Co. vs. Johnson, 244 Fed. 368.
Cleveland C. C. & St. L. Ry. Co. vs. Baker, 91 Fed. 224, 226.

There is no doubt that a railroad company having authority to establish rules for the government of employees may waive obedience to the rules, or may entirely acquiesce in a disregard of the rules so continuously as to justify the inference that they are no longer in force and that obedience is not required. This was the fact in the case at bar. The supposed rule had been abrogated and Caldine was not negligent in violating an abrogated rule.

But even if we assume that Caldine was negligent in the violation of a positive rule in signalling the car to go forward it cannot be reasonably and logically said that his negligence was the sole and proximate cause of the accident. As was said by the Court of Appeals of the State of New York in reaffirming the verdict of the Trial Court:

> "Nevertheless, the conductor, in violation of printed orders, signaled the gasoline car

to proceed toward River Forks and the motorman, also in violation of them, obeyed the signal and started the car in plain sight of the station agent. The conductor's negligence cannot be viewed as the sole proximate cause of the collision. The station agent could and should have prevented it. So could the motorman. All three were negligent. If Caldine had not signaled in violation of orders, the collision would not have occurred. Neither would it have happened if Dawson had communicated Risley's message to Caldine. If Dibble had performed his duty and, in the absence of written abrogation of permanent orders, had refused to obey Caldine's signal, the gas car would have remained at Bridgewater yard and allowed the freight to take the turntable siding. Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble. * * * If other employees in secondary relation to the movement of trains might, by mere possibility, be deemed negligent, then actual negligence by the deceased is regarded as the sole and proximate cause of his death (*Davis vs. Kennedy*, 266 U. S. 147). Here the negligence of decedent's co-employee, Dawson, is more than merely possible. It is actual and flagrant. Dibble, the motorman, like Kennedy, the engineer, was in direct control of the car's movement and his failure to await the arrival of the freight was the primary cause of the collision. His duty bound him to disregard the conductor's signal until he was certain that the freight had taken the turntable siding. The conductor's duty was merely secondary to that of the motorman.

in accordance with the fundamental principles underlying the law as determined and announced by this Court.

2. The judgment complained of is proper and in violation of no rights of the petitioner and should be affirmed.

THOMAS B. KATTELL,
Attorney for Respondent.

DAVID F. LEE,
Of Counsel.

This, as we understand, conforms with the reasoning in the *Kennedy* case (*supra*)" (R., pp. 118-121, f. 155).

It is the contention of the respondent that the collision and resulting death of Caldine was caused not alone by any negligence of Caldine, if said Caldine can be considered negligent, but was caused in whole or in part by the negligence of Dawson and the negligence of Dibble, the motorman. Dawson did not give Risley's telephone message to Caldine. Certainly if this information had been given to him the collision would not have occurred. Instead of doing so Dawson sat on a bench outside of the station at Bridgewater chatting with some other men instead of attending to his business at the time in question. Dibble was negligent in that in the face of positive orders, if there were such orders, he started the car knowing that a collision was inevitable. Can it be said as a matter of law that Dawson under the circumstances owed no duty to inform Caldine of the telephone message from Risley? The petitioner seeks to hide the actual and flagrant negligence of Dawson by stating he was not negligent and asserting that if he had given Caldine the message it would have amounted to nothing more than saying, "Obey your written instructions." Respondent submits that it would have amounted to a great deal more. It would have prevented the collision. Dawson sat idly by while the train left the station knowing that a collision was inevitable. Under the circumstances he owed the legal, human duty to give the information which would have avoided this terrible occurrence.

The petitioner contends that the Court of Appeals was in error in holding that the motorman of the train should not have obeyed the signal, stating that the holding is erroneous and is a most dangerous one for if the engineer of a train can at will violate the signal of a conductor the safety of the employees of the carrier and the safety of the traveling public as well would be jeopardized to the highest degree. As a matter of fact, the Court of Appeals of New York did not hold that the engineer of a train can at will violate the signals of a conductor, but properly and justly held that the engineer is in direct control of the train's movement and if the engineer, as well as the conductor, is under definite rules of the company the engineer owes a legal duty to abide by the rules and would be guilty of negligence in not adhering to them. It certainly would be a dangerous and illogical rule to hold that the motorman should always follow the signals of a conductor even though it was in violation of a rule and even though he knew that following such signals would place the train in inevitable danger.

The contention of the petitioner that the Appellate Division was correct in holding that no recovery could be had in this case and in basing that holding upon the decision of this Court in the case of *Kennedy vs. Davis*, 266 U. S. 147 (218 A. D. 5, 217 N. Y. S. 705) (R., p. 146, f. 113) is unfounded. The Court of Appeals has properly applied the *Kennedy* case and was justified in reversing the decision of the Appellate Division. The *Kennedy* case, in so far as it relates to Caldine's negligence, is distinguishable from the case at bar in many

respects. In that case the engineer, Kennedy, was killed and the action was brought against the railroad company on the ground that possibly some of the other members of the crew, secondary in command, were bound to look out for approaching trains coming in a opposite direction, and that their negligence contributed in a proximate way to the death of the engineer. In that case the facts were such that the other employees' negligence was secondary to that of the plaintiff's. It could hardly be contended in the case at bar that Dawson's negligence or Dibble's negligence was secondary to anyone. Dawson's negligence was in fact primary for, as station agent, he was conclusively presumed to know the schedule of all the trains on that line. Dibble's negligence was also primary and proximate as stated in the opinion of the Court of Appeals of the State of New York. The *Kennedy* case was decided upon the case of *Freese vs. Chicago, Burlington and Ohio R. R. Co.*, 263 U. S. 1, and upon the fact that even if those in secondary relation did their duty and performed every act they should have done, even then the accident might have occurred. In the *Kennedy* case no one was negligent other than Kennedy himself, whereas in the case at bar certainly the negligence of Dawson or Dibble or the negligence of both of them was in part at least a proximate cause of the collision. In the *Kennedy* case the train coming from the opposite direction had the right of way. Whereas, in the instant case the passenger car upon which Caldine was conductor had the right of way over the freight train which was coming in the opposite direction (R., p. 55, f. 70). In the

Kennedy case plaintiff was told of the car coming, whereas in the instant case Caldine was not told.

In the case at bar it is the contention of respondent that respondent's intestate was free from contributory negligence by reason of the custom which had grown up of the operator, Dawson, at Bridgewater notifying him when the freight train was coming north on the same track on which he was going south; however, if this Court feels, as did the Court of Appeals of the State of New York, that Caldine was negligent, the most which can be said is that his negligence was only in part a proximate cause of the collision in question and under the statute this is not a bar to recovery but only goes to diminish the damages in proportion to the contributory negligence of respondent's intestate.

> *Compiled Statutes of the United States*, Vol. 8, p. 9423, Sec. 8659.

Contributary negligence does not bar a recovery under the Employers' Liability Act.

> *Union Pac. R. R. Co. vs. Hadley*, 246 U. S. 330.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the plaintiff's intestate in that case was a brakeman who was killed while in the caboose of his train. His duty, by positive railroad rule, required him to go back and give certain signals to trains in the rear thereof when his own train was stopped on the tracks. The brakeman failed to go back and flag a train coming from the rear of his train, but stayed in the caboose, and a train coming from the rear ran into the caboose and killed the brakeman, plaintiff's intestate, but the United

States Supreme Court held that his negligence was not the only proximate cause of his death, for it appeared in that case that the train which ran into the train which killed him was at the place in question by reason of the negligent operation of trains by a dispatcher and station agent of the railroad company in routing trains.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the train which ran into plaintiff's intestate's train in that case would not have been at the place of collision had the dispatcher done his duty, and in the case at bar had the dispatcher and operator, Dawson, done his duty and notified respondent's intestate that the Freight Train No. 15 was coming, then respondent's intestate would not have been at the place in question.

In the case of *Union Pacific Railroad Company vs. Hadley, supra*, the Court held that Hadley, the brakeman, was negligent in not going back and notifying trains coming from the rear after his train had been stopped, and, although this was actual proof of negligence on his part, the Court held that it could not be declared as a matter of law that the proximate cause of the brakeman's death was his contributory negligence and that, under the Federal Employers' Liability Act, it did result, in part, in the negligence of an employee of the railroad company.

Hence, under the ruling in the *Hadley* case, *supra*, the instant case certainly presented a question of fact for the jury upon the proposition of the negligence of the petitioner's other employees and the contributory negligence of respondent's intestate.

The Court, in the case of *Chicago, Rock Island & Pacific Railroad Company vs. Ward*, 252 U. S. 18, sets forth the provision that under the Federal Employers' Liability Act, contributory negligence is not a defense and only goes in mitigation of damages.

Where the defendant's act or acts were a part of the cause of the collision, the plaintiff may recover, no matter how much contributory negligence there is on his part.

N. Y. Central & St. L. R. Co. vs. Neibel, 214 Fed. 952.

Spokane T. E. & R. Co. vs. Campbell, 217 Fed. 518.

Whether under the facts of this case Caldine's negligence was the sole cause of his injury or whether the negligence of the other employees contributed as a part of the cause was a question of fact for the jury and has already been decided by them. The Appellate Division of the State of N. Y., with all due and kind respect to them, erred when they hold that the deceased was proximately and solely to blame for his own death for as said by Judge Knappen, speaking for the Federal Circuit Court of Appeals in the *Pennsylvania Co. vs. Cole*, 214 Fed. 948: "But the Employers' Liability Act expressly abrogates the common-law rule under which action was barred by negligence of the plaintiff proximately contributing to the accident and substitutes therefor the rule of comparative negligence. Under this act no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery." As

was stated in *Grand Trunk W. Railway vs. Lindsay*, 201 Fed. 836, 844, in passing upon the contention that the plaintiff's action was barred by his proximate negligence the Circuit Court of Appeals for the 7th Circuit said: "It is only when the plaintiff's act is the sole cause, when defendant's act is no part of the causation, that the defendant is free from liability under the act." This ruling was held correct by the Supreme Court in *Grand Trunk W. Railway Co. vs. Lindsay*, 233 U. S. 42, at page 47.

The Federal Statute would be nullified if it was held, under the facts of the instant case, that the acts of respondent's intestate were the sole proximate cause of his injury and death.

Conclusion.

It is respectfully submitted:

1. The Court of Appeals of New York by its opinion and judgment in this case has reasonably and properly applied the provisions of the Employers' Liability Act in accordance with the fundamental principles underlying the law as determined and announced by this court.

2. The judgment complained of is proper and in violation of no rights of the petitioner and should be permitted to stand.

3. The writ of certiorari should not be granted.

THOMAS B. KATTELL,
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